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Justice Blackmun, Franz Kafka, and Capital Punishment

*Martha J. Dragich**

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I. INTRODUCTION

Over the course of his thirty-five years as a judge, Justice Harry A. Blackmun seemed to change his views on the death penalty.¹ In what one commentator called a “remarkable transformation,”² Justice Blackmun evolved from staunch upholder to outspoken opponent of capital punishment. Commentators have analyzed Justice Blackmun’s shift on the death penalty primarily as part of a larger ideological progression from conservative to liberal.³ Others interpret his change of view as part of an evolving jurisprudence of compassion.⁴ Still others analyze Blackmun’s evolution as an outgrowth of his

1. See generally Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun’s Death Penalty Epiphany*, 43 U. KAN. L. REV. 367 (1995).

2. D. Grier Stephenson, Jr., *Justice Blackmun’s Eighth Amendment Pilgrimage*, 8 B.Y.U. J. PUB. L. 271, 320 (1994).

3. See generally Jeffrey B. King, Comment, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun*, 33 HOUS. L. REV. 277 (1996); Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983); *Drifting Left: Blackmun Speaks*, LEGAL TIMES, April 11, 1994, at 13.

4. See generally, Coyne, *supra* note 1; Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173 (1995); Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, 210 NEW REPUBLIC 13 (1994); Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745 (1994); Benjamin Zipursky, Note,

"personal and jurisprudential modesty."⁵ These explanations, though illuminating, fail to account fully for Justice Blackmun's supposed about-face on the most important and difficult of questions.

Justice Blackmun, himself, repeatedly offered glimpses—rare among judges—into his inner struggle with death penalty cases. Early in his career as an appellate judge, in *Maxwell v. Bishop*,⁶ Blackmun discussed, in highly personal terms, the conflict between his deeply-held personal convictions on capital punishment and his conception of his duty as a judge:

The fact that [the sentence imposed] is the death penalty . . . makes the decisional process . . . particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.⁷

Justice Blackmun returned to this theme in *Furman v. Georgia*.⁸ Though he "personally . . . rejoice[d]"⁹ that the Court struck down the death penalty, Blackmun wrote in dissent:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds . .

DeShaney and the Jurisprudence of Compassion, 65 N.Y.U. L. REV. 1101 (1990).

5. Lynn E. Blais, *Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas, and Justice Blackmun's Capital Punishment Jurisprudence*, 97 DICK. L. REV. 513, 517 (1993).

6. 398 F.2d 138 (8th Cir.), *cert. granted*, 393 U.S. 997 (1968), *vacated*, 398 U.S. 262 (1970).

7. *Id.* at 153-54 (footnotes omitted). The other panel judges did not join in this comment. *Id.* at 153 n.11. The first hint of this sentiment appears in Blackmun's majority opinion in *Maxwell v. Stephens*, which concludes:

Where life is concerned a [denial of the petition for habeas corpus] may involve a personal reluctance for judges. We deal, however, with statutory provisions which are not our province, at least not yet . . . Maxwell's life therefore must depend upon different views entertained by the Supreme Court of the United States or upon the exercise of executive clemency.

Maxwell v. Stephens, 348 F.2d 325, 338 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965).

8. 408 U.S. 238 (1972) (*per curiam*). In *Furman*, the Court considered three death sentences, one for murder and two for rape. The Court reversed all three sentences, holding that the "death penalty in these cases constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-40.

9. *Id.* at 414 (Blackmun, J., dissenting).

. . . Were I a legislator, I would vote against the death penalty I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here . . . is to pass upon the constitutionality of legislation This is the sole task for judges.¹⁰

Years later, Blackmun began to express doubts about the constitutionality of capital punishment, writing, in *Sawyer v. Whitley*,¹¹ of his "ever-growing skepticism that . . . the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment."¹² Later, in *Herrera v. Collins*,¹³ he elaborated:

I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.¹⁴

Finally, in *Callins v. Collins*,¹⁵ Justice Blackmun announced:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no

10. *Id.* at 410-11. Justice Blackmun concluded his dissent by stating that the Court's decision could not be justified "as a matter of history, of law, or of constitutional pronouncement." *Id.* at 414.

11. 505 U.S. 333 (1992).

12. *Id.* at 351 (Blackmun, J., concurring in the judgment).

13. 506 U.S. 390 (1993).

14. *Id.* at 446 (Blackmun, J., dissenting) (citations omitted).

15. 510 U.S. 1141 (1994).

combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.¹⁶

Justice Blackmun concluded that the "death penalty, as currently administered, is unconstitutional."¹⁷ Although unwilling even then to adopt the position long espoused by Justices Brennan and Marshall that the death penalty is *in all circumstances* unconstitutional,¹⁸ Justice Blackmun held out little hope that the Court would "develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme."¹⁹

Justice Blackmun's remarks immediately raise two questions: to what extent his view changed on the constitutionality of capital punishment, and whether his conception of judging shifted. Previous explanations of Blackmun's death penalty evolution tend to blur these two inquiries. One explanation is that Justice Blackmun's general shift toward liberalism eventually made it impossible for him to exercise the restraint necessary to defer to the legislative and popular will favoring capital punishment.²⁰ A second explanation is that his tendency toward sentimentality and emotionalism caused a degeneration of Justice Blackmun's death penalty jurisprudence.²¹ A third question concerns the role of statements of personal belief in judicial opinions. Justice Blackmun has been criticized for his tendency to write personally in death penalty and other opinions.²² This Article explores, in particular, the discrepancy between Justice

16. *Id.* at 1145 (Blackmun, J., dissenting from denial of certiorari) (footnote omitted).

17. *Id.* at 1159.

18. Compare *Barclay v. Florida*, 463 U.S. 939, 975 (1983) (Marshall, J., dissenting) ("I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments."), and *California v. Brown*, 479 U.S. 538, 547 (1987) (Brennan, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments . . ."), with *Victor v. Nebraska*, 511 U.S. 1, 38 (1994) (Blackmun, J., concurring in part and dissenting in part) ("Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our constitution . . ."), and *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari) (concluding that the death penalty "as currently administered" is unconstitutional).

19. *Callins*, 510 U.S. at 1159 (Blackmun, J., dissenting from denial of certiorari).

20. See, e.g., Coyne, *supra* note 1; Karlan, *supra* note 4.

21. See, e.g., Rosen, *supra* note 4.

22. See, e.g., Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995) (noting that "the opinions in which [Blackmun] expressed his heartfelt views . . . are embarrassing performances precisely because they seem the unmediated expression of self"); Rosen, *supra* note 4; Mark A. Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L. J. 251 (1992); Stuart Taylor, Jr., *Justice Blackmun's Jurisprudence of Compassion*, LEGAL TIMES, April 11, 1994, at 26.

Blackmun's personal view and his votes in death penalty cases. In non-death penalty cases where Justice Blackmun spoke passionately of his personal views, his rhetoric corresponded with his votes.²³ By contrast, Justice Blackmun's statements of personal antipathy toward the death penalty for many years clashed with his votes to uphold the punishment.²⁴ A full account of Justice Blackmun's death penalty jurisprudence must consider what to make of this discrepancy.

This Article explores in detail the "transformation" of Justice Blackmun's view of capital punishment. It isolates Blackmun's death penalty jurisprudence from general notions of his ideological shift toward liberalism or development of a jurisprudence of compassion. This Article analyzes Justice Blackmun's opinions and voting record in death penalty cases throughout his career and identifies the specific factors that seemed to have tipped the constitutional scales toward rejection of the penalty. By plotting out individual decisions, it may be possible to determine what caused Justice Blackmun's death penalty "epiphany."²⁵ The Article also follows the distinct tracks of Justice Blackmun's personal view (reflected in his opinions) and his decisions (marked by his voting record) and determines the point of their convergence. It then examines connections between Franz Kafka's short story, *In the Penal Colony*,²⁶ and Justice Blackmun's statements and actions.²⁷ It considers literary criticism and

23. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (involving abortion); *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (involving child abuse).

24. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.), cert. granted, 393 U.S. 997 (1968), vacated, 398 U.S. 262 (1970).

25. See Coyne, *supra* note 1, at 367 (using the term "epiphany" in the title of the article).

26. Franz Kafka, *In the Penal Colony*, in *LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES* 217, 217-35 (Elizabeth V. Gemmette ed., 1995). Further references are to pages in this edition.

27. Scholars make a variety of claims about the relevance of literature to the study of law. See, e.g., MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* xvi (1995) (stating that literary imagination is "an essential ingredient of an ethical stance . . . concern[ed] . . . with the good of other people whose lives are distant from our own"); C.R.B. Dunlop, *Literature Studies in Law Schools*, 3 *CARDOZO STUD. L. & LIT.* 63, 97 (1991) (stating that fiction "creates alternative realities, asks hard questions about fact and evidence, and . . . subverts the seeming orderliness of the law"); Paul Gewirtz, *Aeschylus' Law*, 101 *HARV. L. REV.* 1043, 1050 (1988) (stating that literature "nourishes the kinds of human understanding not achievable through reason alone"); Richard Weisberg, *Coming of Age Some More: "Law and Literature" Beyond the Cradle*, 13 *NOVA L. REV.* 107, 110 (1988) (stating that "literature is the best source (outside of ourselves) of sense and sensibility" required of lawyers and judges); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 *MERCER L. REV.* 867, 872 (1988) (stating that literature stimulates "ability to understand the subjective being of the other," even one with very different background). But see RICHARD A. POSNER, *LAW*

interpretation of the story as a means of exploring what may have motivated Justice Blackmun's eventual change of view.²⁸ The Article discusses the problem of judging death penalty cases, comparing Justice Blackmun's death penalty jurisprudence to the struggle of a character in Kafka's story. It focuses on three critical moments in the decisional process—hesitation, decision, and escape—and assesses Justice Blackmun's performance at each step. It concludes that although Justice Blackmun's views remained consistent throughout his judicial career, his death penalty legacy is equivocal, and in some important respects, unsatisfying.

II. IN THE PENAL COLONY

Justice Blackmun's moral and judicial dilemma surrounding the death penalty is uncannily similar to that experienced by a character, the (otherwise unnamed) explorer, in Kafka's short story. The substantial body of literary criticism and interpretation of the explorer's resolution of his own dilemma suggests an understanding of Justice Blackmun's death penalty jurisprudence. A brief synopsis of the story follows, with references to parallels in Blackmun's opinions.

In Kafka's story, an explorer goes to an island penal colony at the invitation of its new Commandant. The explorer is to witness and report his assessment of—in a sense, to judge—the colony's execution practices.²⁹ The officer in charge of executions explains the grisly procedure³⁰ and the lack of a trial or other procedural safeguards.³¹ The explorer feels revulsion³² but refrains from

AND LITERATURE: A MISUNDERSTOOD RELATION 353 (1988) ("reject[ing] the grandest claims that have been made" on behalf of interdisciplinary study of law and literature).

28. As one critic of *In the Penal Colony* notes, however, "much of what is in the [protagonist's] mind remains unrevealed" as well, a "limitation highly characteristic of Kafka." ROY PASCAL, *KAFKA'S NARRATORS: A STUDY OF HIS STORIES AND SKETCHES* 64 (1982).

29. For a discussion of the explorer's role, see *infra* note 359.

30. The prisoner is strapped to the bed of the execution apparatus. Kafka, *supra* note 26, at 218-19. The sentence, in this case "Honor Thy Superiors!" is programmed into the apparatus so that a row of needles will inscribe it into the prisoner's flesh, ever more deeply, over a period of many hours. Kafka, *supra* note 26, at 220-23. The prisoner supposedly experiences revelation before dying. Kafka, *supra* note 26, at 223. Similarly, Justice Blackmun's opinion in *Callins* begins with a graphic description of the method of execution by lethal injection. See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

31. The prisoner did not know his sentence, did not know that he had been sentenced, and had had no chance to put on a defense. Kafka, *supra* note 26, at 220. The officer explained to the explorer his guiding principle that "guilt is never to be doubted." Kafka, *supra* note 26, at 220. Justice Blackmun complained repeatedly about the federal courts' refusal to review capital cases, see, e.g., *Herrera v. Collins*, 506 U.S. 390, 438-39 (1993) (Blackmun, J., dissenting), and *Coleman v. Thompson*, 504 U.S.

criticizing or interfering in the imminent execution of the prisoner.³³ But neither does he accept the officer's invitation to participate in the execution. The explorer's distaste eventually becomes apparent to the officer, who fears the explorer will report unfavorably on the execution to the new Commandant.³⁴ The explorer, however, maintains even then that he will report only his personal view, which should have little influence.³⁵ When the officer realizes he cannot persuade the explorer to support the execution,³⁶ he frees the prisoner.³⁷ The

188, 189-90 (1992), and about its "unduly cramped view of 'actual innocence.'" See, e.g., *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (Blackmun, J., dissenting).

32. The explorer reflected that "[t]he injustice of the procedure and the inhumanity of the execution were undeniable." Kafka, *supra* note 26, at 224. The prisoner was ignorant of the law, and the alleged offense was minor: falling asleep while on guard outside his superior's door. Kafka, *supra* note 26, at 221.

33. "The explorer thought to himself: It's always a ticklish matter to intervene decisively in other people's affairs. He was neither a member of the penal colony nor a citizen of the state to which it belonged." Kafka, *supra* note 26, at 224. He reminded himself that "this was in any case a penal settlement where extraordinary measures were needed and that military discipline must be enforced to the last." Kafka, *supra* note 26, at 221. Though the explorer "traveled only as an observer, with no intention at all of altering other people's methods of administering justice, . . . here he found himself strongly tempted" to intervene. Kafka, *supra* note 26, at 224. So it was for Blackmun in *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.), *cert granted*, 393 U.S. 997 (1968), *vacated*, 398 U.S. 262 (1970), and *Callins v. Collins*, 510 U.S. 1141, 1157-59 (1994) (Blackmun, J., dissenting from denial of certiorari), where Justice Blackmun explained his longstanding deference to legislative bodies and suggested, though without optimism, that the Court may one day "develop procedural rules or verbal formulas" to guide legislatures in fashioning capital-sentencing schemes that would pass constitutional muster.

34. The officer hypothesizes that the explorer "would not be likely to take a strong line against [the] proceedings," but notes that even a casual remark might suffice. Kafka, *supra* note 26, at 227. The explorer might report, for example, that in his country they "have a different way of carrying out justice." Kafka, *supra* note 26, at 227. Blackmun does exactly that in *Furman*, where he notes that because he had

lived for many years in a State that does not have the death penalty, that effectively abolished it in 1911, and that carried out its last execution on February 13, 1906, capital punishment had never been a part of life for me.

In my State it just did not exist.

Furman v. Georgia, 408 U.S. 238, 406 (1972) (Blackmun, J., dissenting) (footnotes omitted) (discussing the State of Minnesota, also the home state of the author of this Article).

35. "If I were to give an opinion," he says, "it would be as a private individual, an opinion no more influential than that of any ordinary person." Kafka, *supra* note 26, at 228. Departing significantly from judicial opinion-writing conventions, Justice Blackmun several times offered his personal opinion. See, e.g., *Callins*, 510 U.S. at 1145, 1159 (Blackmun, J. dissenting from denial of certiorari); *Furman*, 408 U.S. at 405 (Blackmun, J. dissenting); *Maxwell v. Bishop*, 398 F.2d at 153-54.

36. The officer begs the explorer to help him persuade the new Commandant, but

officer then subjects himself to the execution machine, which is now programmed to inscribe the sentence "Be Just!"³⁸ Instead, the machine goes awry³⁹ and impales the officer, killing him without bringing about understanding or redemption.⁴⁰ The story ends with a bizarre epilogue recounting the explorer's escape from the island.⁴¹

[f]rom the very beginning the explorer had no doubt about what answer he must give; in his lifetime he had experienced too much to have any uncertainty here; he was fundamentally honourable and unafraid. And yet now, . . . he did hesitate. . . . At last, however, he said, as he had to: "No. . . . I do not approve of your procedure."

Kafka, *supra* note 26, at 229-30. Blackmun's grave doubts, voiced first in *Maxwell v. Bishop*, see *supra* note 27 and accompanying text, foreshadow his eventual refusal, in *Callins*, to condone capital punishment any longer.

37. Justice Blackmun's votes reversing death sentences often had far less impact. By my count, he voted "no" to the death penalty in 92 decisions. See Appendix I, *infra* page 924. In many of these cases, a majority of the court upheld the penalty, thereby depriving Justice Blackmun's "no" vote of any real impact on the defendant. In the remainder, impact on the defendant varied from imposition of a stay of execution to reversal of the death sentence.

38. Justice Blackmun eventually concluded that this was *Furman's* command, as amplified by *Lockett v. Ohio*, 438 U.S. 586 (1978). See *Callins v. Collins*, 510 U.S. 1141, 1147 (1994) (Blackmun, J., dissenting from denial of certiorari) (commenting that *Furman's* "promise" is that the death penalty must be "administered consistently and rationally," i.e., justly, or not at all).

39. The "machine was obviously going to pieces; its silent working was a delusion." Kafka, *supra* note 26, at 233. Justice Blackmun came to believe that the tension between the "competing constitutional commands" of consistency and rationality required under *Furman*, and fairness to the individual, mandated by *Lockett*, is irreconcilable. *Callins*, 510 U.S. at 1149-52, 1155-57 (Blackmun, J. dissenting from denial of certiorari). Together with the federal courts' inhospitality to review of capital cases, this irreconcilable tension caused Blackmun to announce that he would "no longer . . . tinker with the [implicitly broken] machinery of death." *Id.* at 1145.

40. "No sign was visible of the promised redemption." Kafka, *supra* note 26, at 234. Similarly, for Justice Blackmun, *Furman's* promise remains "unfulfilled," *Callins*, 510 U.S. at 1153 (Blackmun, J., dissenting from denial of certiorari), and is, in fact, unachievable. *Id.* at 1157.

41. Kafka, *supra* note 26, at 234-35.

Kafka's story echoes the progression of Blackmun's death penalty views on many levels: terminology,⁴² "plot,"⁴³ theme,⁴⁴ and the prevailing sense of equivocation.⁴⁵ According to one critic,

In its tone, the story is a matter-of-fact description of an elaborate method of punishment, no longer believed in by the "enlightened," kept going a little longer by the devotion of an old man who doesn't understand it very well and can't repair it [T]he explorer . . . is shocked by what he sees and yet . . . can understand the possible use of the machine in what is, after all, a penal colony.⁴⁶

But Kafka acknowledges the flaws of the machine as well: cruelty, errors, cost, and obsolescence.⁴⁷ This description of the story is not far off the mark in describing the state of capital punishment in this country, particularly during the tumultuous decades of the 1960s and 1970s, early in Justice Blackmun's judicial career.

Consider, for example, remarks of the officer to the explorer early in the story:

This procedure and method of execution, which you are now having the opportunity to admire, has at the moment no longer any open adherents in our colony. I am its sole advocate I can no longer reckon on any further extension of the method, it takes all my energy to maintain it as it is.⁴⁸

42. Kafka's use of the terms "apparatus," Kafka, *supra* note 26, at 217, "passim" and "machine," Kafka, *supra* note 26, at 231-34, foreshadows Justice Blackmun's phrase "the machinery of death." *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari). Similarly, the explorer regards the officer's death in the machine as neither "exquisite torture" nor just punishment, but "plain murder." Kafka, *supra* note 26, at 233. In *Herrera v. Collins*, 506 U.S. 390 (1993), Justice Blackmun concludes that "[t]he execution of a person who can show that he is innocent comes perilously close to simple murder." *Id.* at 446 (Blackmun, J., dissenting).

43. I would describe the plot of the story as the explorer's progression from distaste but deference to outright rejection of punishment. See *supra* notes 32-36 and accompanying text.

44. I take the theme of the story to involve the obligations of judging or the nature of judgment. Literary critics describe the basic theme as struggle. See *infra* notes 338-39 and accompanying text.

45. See, e.g., PASCAL, *supra* note 28, at 89 (describing the story's inconclusive ending). Justice Blackmun's equivocation on the death penalty is explored at length *infra* Part IV.

46. Warren Austin, *An Exegetical Note on "The Penal Colony,"* 7 SOUTHERN REV. 363, 364-65 (1941).

47. *Id.* at 365.

48. Kafka, *supra* note 26, at 225.

The officer recalls bygone days when the execution "ceremony" was attended by throngs of people who "all knew . . . Justice [was] being done" and who "bathed [their] cheeks in the radiance of that justice."⁴⁹ Likewise, in *Furman*, Justice Marshall commented that "executions, which had once been frequent public spectacles, became infrequent private affairs."⁵⁰ In an epilogue to the story, which comes after he has rejected the execution practice, the explorer learns of a "prophecy that after a certain number of years the [old] commandant [who devised the execution process] will rise again and lead his adherents . . . to recover the colony."⁵¹ Bystanders find the prophecy "ridiculous" and expect the explorer to agree with them.⁵² But the explorer, apparently believing the prophecy, flees the island.⁵³

Justice Blackmun announced his retirement from the Court in April 1994, not long after his startling pronouncement in *Callins*. Though thirty-two years separated Justice Blackmun's retirement from the *Furman* decision, Kafka's story can be situated, interpretively, around the time of *Furman*. *Furman* both represents the nadir of capital punishment and sets the stage for its return, only four years later, with the Supreme Court's decision in *Gregg v. Georgia*.⁵⁴

III. JUSTICE BLACKMUN'S DEATH PENALTY OPINIONS

Justice Blackmun's death penalty opinions follow a tortured path leading to his final pronouncement in *Callins*. The language of the opinions is sometimes jarringly at odds with Blackmun's votes, revealing deep inner conflict on the issue. Moreover, several of Justice Blackmun's early decisions were so extremely deferential to the legislative will to impose the penalty—even when a majority of the Court voted to invalidate it⁵⁵—that his ultimate rejection of

49. Kafka, *supra* note 26, at 226.

50. *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring) (reviewing the history of capital punishment and noting that the language of the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"). Marshall acknowledged that the abolitionist movement, which from 1830-1900 had eliminated capital punishment in several states and "greatly reduced its scope" in others, had "lost its vigor" by the time of the *Furman* decision. *Id.* at 338.

51. *Id.* at 234.

52. *Id.*

53. *Id.* at 235.

54. Many of the states rushed to enact new death penalty statutes immediately after *Furman* invalidated their old ones. Several of the new statutes were upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976).

55. *Furman* is the paradigm: Blackmun's vote to uphold the death penalty is completely out of synch with his own anguished "statement" and the views of five Justices. See *Furman v. Georgia*, 408 U.S. 238, 405-06, 414 (Blackmun, J., dissenting). Equally puzzling are his votes to affirm mandatory death sentences, especially after he

capital punishment is startling. But as an examination of his opinions shows, Justice Blackmun's "epiphany" could have been foretold long before *Callins*.

This section reviews Justice Blackmun's death penalty opinions on the theory that they offer the best evidence of his views.⁵⁶ And because Justice Blackmun wrote, for the Court or separately, in nearly all the Court's major capital punishment cases, his opinions provide a generous sample of his views throughout his judicial career.⁵⁷ This section is divided into several subparts. The first summarizes Justice Blackmun's own review of his death penalty jurisprudence. The next reviews Blackmun's Eighth Circuit opinions. The third part reviews Supreme Court opinions from Justice Blackmun's elevation to the Supreme Court in 1970 through 1977. The final part covers opinions from 1978 through Justice Blackmun's retirement in 1994 and identifies three strands in his "transformation:" individualized sentencing, procedural safeguards, and meaningful review.

A. Justice Blackmun's Own Review

Justice Blackmun reviewed his own—and the Court's—death penalty odyssey in *Callins*.⁵⁸ In his own words, Blackmun "refrained from joining the majority [in *Furman*] because [he] found objectionable the Court's abrupt change of position in the single year that had passed since *McGautha*."⁵⁹ Experience eventually taught, however, that *Furman*'s holding was correct.⁶⁰ Repeating the Court's frequent statement that "the Eighth Amendment's prohibition against cruel and unusual punishments 'may acquire meaning as public opinion becomes enlightened by a humane justice,'"⁶¹ Justice Blackmun

expressed misgivings in *Furman* about this very sort of sentence. See *Roberts v. Louisiana*, 431 U.S. 633, 638-639 (1977) (Blackmun, J., dissenting) [hereinafter *Harry Roberts*]; *Roberts v. Louisiana*, 428 U.S. 325, 363 (1976) (Blackmun, J., dissenting) [hereinafter *Stanislaus Roberts*]; *Woodson v. North Carolina*, 428 U.S. 280, 307-08 (1976) (Blackmun, J., dissenting). In each of these cases the Court rejected the death penalty over Blackmun's dissent.

56. See, e.g., Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125, 127 (1995) (discussing the use of written opinions to determine an individual Justice's views).

57. Occasionally cases in which Blackmun did not write are also discussed, in an effort to glean his views on a critical issue from the opinion he joined, or simply to present his vote.

58. *Callins v. Collins*, 510 U.S. 1141, 1146-57 (1994) (Blackmun, J., dissenting from denial of certiorari).

59. *Id.* at 1147 (citing *McGautha v. California*, 402 U.S. 183 (1971), which upheld the death penalty despite the fact that the statute at issue left discretion to impose it entirely to the jury).

60. *Id.* at 1147-48 (noting that "the real meaning of *Furman*'s diverse concurring opinions did not emerge until some years" later).

61. *Id.* at 1147 (quoting *Furman v. Georgia*, 408 U.S. 238, 409 (1972) (Blackmun,

concluded in *Callins* that “contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of death” and that “evolving standards of decency required due consideration of the uniqueness of each individual defendant.”⁶² This “development in the American conscience [presents] a constitutional dilemma” because “the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death.”⁶³

At the same time, Justice Blackmun explained that his

willingness to enforce the capital punishment statutes enacted by the states and the Federal Government . . . “has always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary’s power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed.”⁶⁴

Because he was no longer confident “that the federal judiciary [would] provide meaningful oversight to the state courts as they exercise[d] their authority to inflict the penalty of death,”⁶⁵ Justice Blackmun concluded that the death penalty was unconstitutional.⁶⁶ Unlike those who analyze his death penalty transformation as part of an ideological shift⁶⁷ or a jurisprudential evolution⁶⁸—internal processes—Justice Blackmun appears to believe that American society and the Court itself transformed themselves in ways so fundamental as to require him to concede, after twenty years, that *Furman* was correctly decided.⁶⁹ Thus, in Justice Blackmun’s view, the change was external to him.

J., dissenting)).

62. *Id.* at 1149.

63. *Id.*

64. *Id.* at 1157 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 358 (1992) (Blackmun, J., concurring)).

65. *Id.* at 1158-59.

66. *Id.* at 1159.

67. *See supra* note 3.

68. *See supra* note 4.

69. The thoughts I attribute to Justice Blackmun find a parallel in an article by one of his former clerks, Professor Harold Koh. *See* Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985). Koh recites the commonly-held belief that Justice Blackmun changed while on the Court, but suggests, as he says the Justice believes, that it is not Blackmun but the Court that shifted. *Id.* at 51-52 (attempting to show that Blackmun voted and spoke consistently while consensus on the Court eroded).

B. The Eighth Circuit Opinions

While a member of the Court of Appeals for the Eighth Circuit, Justice Blackmun authored six opinions addressing the validity of the death penalty.⁷⁰ First, in *Bailey v. Henslee*, Blackmun considered claims of racial discrimination in the jury selection process.⁷¹ Arkansas procedure at the time authorized the jury to render a verdict of life imprisonment at hard labor.⁷² The jury declined to do so, and Bailey was therefore sentenced to death. Bailey claimed to have been sentenced by an improperly selected jury. Justice Blackmun found "no exclusion, systematic, studied, or otherwise, of Negroes from regular jury panels in the criminal division since 1952,"⁷³ but did find evidence sufficient to make out a "prima facie case of limitation of members of the Negro race in the selection of this defendant's petit jury panel."⁷⁴ The State was found not to have rebutted this evidence. Justice Blackmun reasoned that a retrial was "demanded by the nature and possible result of this particular case, namely, the constitutionality of jury selection and the capital punishment which may befall the defendant."⁷⁵

Next, in *Feguer v. United States*, Justice Blackmun reviewed allegations of error in sentencing, among a plethora of other issues.⁷⁶ Specifically, he rejected an argument that the trial court should have instructed the jury "to consider, in determining punishment and in favor of life imprisonment as distinguished from the death penalty, any impairment of the defendant's capacity because of mental disease or defect."⁷⁷ Justice Blackmun somewhat cavalierly suggested that "any responsible jury, in determining whether a positive recommendation of the death penalty should be forthcoming . . . will take into consideration just such matters

70. See *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.), *cert. granted*, 393 U.S. 997 (1968), *vacated*, 398 U.S. 262 (1970); *Pope v. United States*, 372 U.S. 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971); *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966); *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965); *Feguer v. United States*, 302 F.2d 214 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962); *Bailey v. Henslee*, 287 F.2d 936 (8th Cir.), *cert. denied*, 368 U.S. 877 (1961). These six cases represent most of the death penalty cases in which Blackmun participated as a circuit judge. See Stephenson, *supra* note 2, at 273 (stating that Blackmun participated in nine such cases). Throughout this section I refer to Blackmun for the sake of consistency as "Justice," even though his title on the Eighth Circuit was "Judge."

71. *Bailey*, 287 F.2d at 938-39.

72. *Id.* at 938.

73. *Id.* at 945.

74. *Id.* at 947.

75. *Id.*

76. *Feguer v. United States*, 302 F.2d 214, 216-17 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

77. *Id.* at 242-43.

as the proposed instruction suggests.”⁷⁸ The court also dismissed a suggestion that the defendant was deprived of a fair trial because the trial court twice requested that his attorney refrain from commenting on his opposition to the death penalty.⁷⁹ Having considered numerous other challenges, the court affirmed Feguer’s conviction and death sentence.⁸⁰

In *Mitchell v. Stephens*, Justice Blackmun’s opinion held that a defendant under sentence of death was entitled to an independent state court determination of the voluntariness of his confession to rape, the crime for which the death penalty had been imposed.⁸¹ In a ten-page review of law and evidence, Blackmun found that the record did not establish involuntariness as a matter of law and that the record supported the district court’s determination that Mitchell’s claim of the unavailability of counsel had no substance.⁸² Even so, Justice Blackmun applied *Jackson v. Denno*⁸³ retroactively to require an independent state court determination on the voluntariness issue.⁸⁴ Justice Blackmun clearly was not persuaded by the evidence in the record that the confession to rape was involuntary, nor was he certain that *Denno* applied to this case.⁸⁵ But because this was “a case of ultimate consequence” to the petitioner, he concluded that the court must be “completely satisfied” that petitioner’s “constitutional rights have been clearly protected.”⁸⁶

In *Pope v. United States*,⁸⁷ the court, sitting en banc considered several arguments relating to the death penalty, such as exclusion from the jury of persons opposed to capital punishment, limitation of defendant’s opportunity to present evidence of mitigation and rehabilitation, and refusal to instruct the jury

78. *Id.* at 243 (noting that the jury had been instructed to base sentence on a “thorough, careful, calm and dispassionate consideration of all the evidence”).

79. *Id.* at 252.

80. Blackmun stated in *Furman* that he “struggled silently with the issue of capital punishment” in *Feguer*, and noted that Feguer “may have been one of the last to be executed under federal auspices” at that time. *Furman v. Georgia*, 408 U.S. 238, 406 (1972) (Blackmun, J., dissenting).

81. *Mitchell v. Stephens*, 353 F.2d 129, 145 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966). Mitchell did not challenge the validity of his confession to the robbery charge, a crime for which the death penalty was not authorized. *Id.* at 133. Mitchell also raised the same two racial issues decided in *Maxwell*; the court reaffirmed its earlier holdings. *Mitchell*, 353 F.2d at 133-35.

82. *Id.* at 145.

83. 378 U.S. 368 (1964).

84. *Mitchell*, 353 F.2d at 142, 145 (acknowledging that *Denno* was decided “after Mitchell’s state court trial and appeals”).

85. *Id.* at 145 (characterizing his doubts as “mild”).

86. *Id.* at 144-45.

87. 372 F.2d 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971).

on its authority not to impose the death penalty.⁸⁸ Justice Blackmun's opinion approved both the trial judge's "purposeful and successful effort . . . to obtain persons [as jurors] who were not prejudiced either for or against capital punishment"⁸⁹ and the instruction on sentencing, which "adequately advised" the jury of its "responsibility and the broad avenues open for its . . . judgment."⁹⁰ The court struggled more with the allocution claim.⁹¹ The federal statute under which Pope was charged authorized the jury to fix punishment at death.⁹² The court recognized that a unitary trial, after which the jury both determines guilt and fixes the sentence, may limit the defendant's opportunity to offer a personal statement in mitigation without compromising his claims of innocence.⁹³ But after reviewing the record and recent opinions of other circuits, Justice Blackmun concluded that Pope was not deprived of the opportunity to present mitigating evidence and that substantial mitigating evidence was, in fact, admitted.⁹⁴ Pope's conviction and sentence were affirmed.⁹⁵

Finally, in *Maxwell v. Bishop*, the Eighth Circuit considered Maxwell's second habeas petition.⁹⁶ Three years earlier, in *Maxwell v. Stephens*, Justice Blackmun held that Maxwell had proved racial discrimination neither in the application of Arkansas' death penalty statute nor in the selection of the petit jury.⁹⁷ The denial of Maxwell's habeas petition was thus affirmed. The second time around, Maxwell's allegation of racial discrimination in the application of the death penalty statute rested on new statistical evidence.⁹⁸ Having considered the evidence at length, Justice Blackmun this time "reject[ed] its application to Maxwell's case" because it did "nothing to destroy the integrity of Maxwell's trial."⁹⁹ Justice Blackmun also dismissed Maxwell's single verdict¹⁰⁰ and jury

88. *Id.* at 714.

89. *Id.* at 725 (noting that veniremen who "indicated a tendency toward insistence on capital punishment" were also excused).

90. *Id.* at 731.

91. Judge Lay wrote separately on this issue. See *id.* at 739-41 (Lay, J., concurring).

92. See 18 U.S.C. § 2113(e) (1994) (bank robbery).

93. *Pope v. United States*, 372 F.2d 710, 728 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971).

94. *Id.* at 730.

95. Again, in this case Justice Blackmun's struggle with capital punishment was silent. See also *Furman v. Georgia*, 408 U.S. 238, 406 (1972) (Blackmun, J., dissenting).

96. *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.), *cert. granted*, 393 U.S. 997 (1968), *vacated*, 398 U.S. 262 (1970) (involving the same defendant as in *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965)).

97. *Maxwell v. Stephens*, 348 F.2d at 334.

98. *Maxwell v. Bishop*, 398 F.2d at 141.

99. *Id.* at 147. Blackmun noted that the study did not include the particular county where the crime occurred and where Maxwell was tried and convicted. *Id.* at 146.

100. *Id.* at 148-51 (relying, in part, on the recent en banc decision, also written by

selection¹⁰¹ arguments before commenting, for the first time, that death penalty cases were, for him, "excruciating."¹⁰²

Justice Blackmun's Eighth Circuit opinions upheld the death penalty four times and invalidated it twice. The results are puzzling. Justice Blackmun clearly subscribed to the general notion that "death is different."¹⁰³ He noted several times the gravity of the question,¹⁰⁴ and exhibited concern, particularly in *Mitchell*, that trial and sentencing procedures in capital cases be above reproach.¹⁰⁵ In *Feguer*, he wrote:

When a criminal case involving the ultimate penalty which the law can impose comes before an appellate court for review, that court has an obligation, serious and profound, to examine with care every point of substance raised by the defense and to acquaint itself intimately with the details of the record.¹⁰⁶

Yet, in *Feguer*, he voted to uphold the penalty despite considerable question as to the defendant's sanity.¹⁰⁷ Similarly, Justice Blackmun seemed unconcerned with the details of sentencing instructions given to juries in *Feguer* and *Pope*, voting in both cases to uphold the penalty. On the other hand, Justice Blackmun's half-hearted defense of the evidence of involuntariness in *Mitchell*,¹⁰⁸ and of the propriety of applying *Denno* retroactively, leaves the reader wondering why he voted to invalidate Mitchell's sentence. In *Bailey*, he

Blackmun, in *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971)).

101. *Maxwell v. Bishop*, 398 F.2d 138, 151-53 (8th Cir.), *cert. granted*, 393 U.S. 997 (1968), *vacated*, 398 U.S. 262 (1970).

102. *Id.* at 153-54.

103. For an early use of this phrase, see *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (Blackmun, J., dissenting); see also *McCleskey v. Kemp*, 481 U.S. 279, 347 (1987) (Blackmun, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) (noting that every Justice had "written or joined at least one opinion endorsing the proposition that . . . the death penalty is qualitatively different from any other punishment"); *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (per curiam) ("We recognize . . . that the death sentence is qualitatively different from all other sentences.").

104. See e.g., *Mitchell v. Stephens*, 353 F.2d 129, 144 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966); *Feguer v. United States*, 302 F.2d 214, 217 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962); *Bailey v. Henslee*, 287 F.2d 936, 941 (8th Cir.), *cert. denied*, 368 U.S. 877 (1961); see also *supra* notes 7, 10.

105. See *Mitchell*, 353 F.2d at 144-45 (remanding the case for a *Denno* hearing despite the trial court's careful attention to procedures designed to protect Mitchell's constitutional rights).

106. *Feguer*, 302 F.2d at 217.

107. *Id.* at 245.

108. *Mitchell*, 353 F.2d at 140.

rejected the penalty upon substantial evidence of racially tainted jury selection procedures.¹⁰⁹ But his opinions in *Maxwell v. Stephens* and *Maxwell v. Bishop* upheld the penalty against charges of racially discriminatory application.¹¹⁰

Two stylistic patterns found in Justice Blackmun's later death penalty opinions first appeared in his Eighth Circuit decisions. First, he displayed, especially in *Feguer*, an unusual attention to the facts of the case and, indeed, of the defendant's life. His *Feguer* opinion begins with a twenty-page recitation of facts.¹¹¹ Justice Blackmun was obviously troubled by the conflicting evidence on the sanity and competency issues that dominated the case and felt compelled meticulously to examine and weigh the evidence. Having done so, he wrote an opinion for the panel affirming *Feguer*'s conviction and sentence. Second, Justice Blackmun's opinion in *Maxwell v. Bishop* gave voice to his personal views on capital punishment.¹¹² In this case, like *Furman* and others to follow, Justice Blackmun voted to uphold the penalty notwithstanding grave personal doubts about its validity.

C. Supreme Court Opinions Through 1977

Harry Blackmun took his seat as Associate Justice of the United States Supreme Court in June 1970.¹¹³ Justice Blackmun first wrote an opinion addressing the death penalty as a member of the Court in 1972¹¹⁴ when he dissented in *Furman v. Georgia*.¹¹⁵ Justice Blackmun joined the dissenting

109. *Bailey v. Henske*, 287 F.2d 936, 948 (8th Cir.), *cert. denied*, 368 U.S. 877 (1961).

110. *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir.), *cert. granted*, 397 U.S. 997 (1968), *vacated*, 398 U.S. 262 (1970); *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.), *cert. denied*, 382 U.S. 944 (1965). The persistence of racial discrimination in capital sentencing became a key element in Justice Blackmun's conclusion that the penalty cannot be fairly imposed. See *infra* note 205.

111. *Feguer v. United States*, 302 F.2d 214, 216-36 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

112. *Maxwell v. Bishop*, 398 F.2d at 153-54 (using the term "excruciating," echoed later in *Furman*).

113. See 398 U.S. xi (1970) (describing the appointment of Justice Blackmun).

114. Blackmun participated in *McGautha v. California*, 402 U.S. 183, 207 (1971), voting to uphold the death penalty, but did not write an opinion. Blackmun also joined per curiam opinions rejecting the penalty in three other cases prior to *Furman*. See *Aikens v. California*, 406 U.S. 813, 814 (1972) (per curiam); *Hunter v. Tennessee*, 403 U.S. 711, 712 (1971) (per curiam); *Maxwell v. Bishop*, 398 U.S. 262, 267 (1970) (per curiam).

115. 408 U.S. 238 (1972) (per curiam) (invalidating the death penalty as then imposed). The same day, the Court decided *Moore v. Illinois*, 408 U.S. 786 (1972), in which Justice Blackmun wrote the majority opinion. On the death penalty claim, the Court reversed the sentence on the basis of *Furman*. *Moore*, 408 U.S. at 800. Blackmun made no further comment on that issue.

opinions of Chief Justice Burger and Justices Powell and Rehnquist, who would have upheld the death penalty, and wrote separately only to add "somewhat personal comments."¹¹⁶ Blackmun's opinion began, as noted earlier, with the statement that these cases present, for him, "an excruciating agony of the spirit."¹¹⁷ He questioned whether capital punishment serves any "useful purpose"¹¹⁸ and suggested that he was sympathetic with the "policy reasons. . . expressed and adopted in the several opinions filed by the Justices who voted to [invalidate the death penalty]."¹¹⁹ Justice Blackmun's vote to uphold the penalty emerged from discomfort at the Court's abrupt departure from *McGautha v. California*,¹²⁰ decided only one year earlier, in which he voted with the majority to uphold the penalty.¹²¹ Justice Blackmun stressed that the prerogative to abolish the death penalty altogether, or to void it in individual cases, belonged to the legislative and executive branches, respectively.¹²² The "sole task for judges," he wrote, "is to pass upon the constitutionality of legislation . . ."¹²³ In a final aside, Blackmun commented on his "fear" that the state legislatures would respond to the several *Furman* opinions by enacting mandatory death sentences.¹²⁴ Such legislation, he said, "is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment."¹²⁵

The Court next considered the death penalty in 1976, when it handed down five decisions on the constitutionality of post-*Furman* capital punishment

116. *Furman*, 408 U.S. at 405 (Blackmun, J., dissenting).

117. *Id.* (echoing the language of *Maxwell v. Bishop*).

118. *Id.*

119. *Id.* at 406.

120. 402 U.S. 183 (1971).

121. While accepting the proposition that the Eighth Amendment may be interpreted according to "the evolving standards of decency that mark the progress of a maturing society," Justice Blackmun refused to accept the notion that such a remarkable change had taken place in the one year since *McGautha*, particularly in view of the fact that Congress, "conscious of the temper of the times," continued to enact legislation providing for the death penalty. *Furman v. Georgia*, 408 U.S. 238, 408-09, 412-13 (1972) (Blackmun, J., dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

122. *Furman*, 408 U.S. at 410 (Blackmun, J., dissenting).

123. *Id.* at 411.

124. *Id.* at 413.

125. *Id.* The element of mercy figures prominently in Justice Blackmun's eventual "epiphany." Justice Blackmun also noted that both the opinions and the arguments before the Court were "curiously devoid of reference to the victims," perhaps the first mention that victim impact might be relevant in sentencing. *Id.* at 413-14. When that issue faced the Court, however, Justice Blackmun voted the other way. See *Booth v. Maryland*, 482 U.S. 496 (1987) (Blackmun joined majority opinion of Justice Powell) (holding victim impact evidence inadmissible); *South Carolina v. Gathers*, 490 U.S. 805 (1989) (Blackmun joined majority opinion of Justice Brennan) (same); *Payne v. Tennessee*, 501 U.S. 808 (1991) (Blackmun joined dissenting opinions of Justices Marshall & Stevens) (both objecting to overruling of *Booth* and *Gathers*).

statutes. In three of the cases, the Court upheld the new statutes.¹²⁶ Though still sharply divided, the Court held in *Gregg v. Georgia* that the death penalty "is not a form of punishment that may never be imposed."¹²⁷ It further held that new procedures, including a bifurcated determination of guilt and sentence,¹²⁸ a requirement that the sentencer find at least one of the enumerated aggravating factors to have been met,¹²⁹ and a provision for rigorous state supreme court review of all death sentences,¹³⁰ satisfied *Furman*'s mandate that death sentences not be imposed arbitrarily or capriciously.¹³¹ In each of these cases, Justice Blackmun wrote separately to concur in the judgment of the Court, merely referring to his opinion in *Furman*.¹³²

The other two of the 1976 cases¹³³ involved mandatory death penalty statutes of the type predicted by Justice Blackmun in *Furman*.¹³⁴ The Court struck down these statutes, holding that they "depart[ed] markedly from contemporary standards respecting the imposition of the punishment of death."¹³⁵ Mandatory death penalty statutes did not suitably channel the jury's discretion because the option remained to acquit the defendant altogether if the penalty seemed too severe.¹³⁶ Moreover, these statutes "fail[ed] to allow . . . particularized consideration of relevant aspects of the character and record of each convicted defendant" before imposing the death sentence.¹³⁷ Strangely, given the sentiments he expressed on this question in *Furman*, Justice Blackmun voted in *Woodson* and *Stanislaus Roberts* to uphold the mandatory death penalty

126. *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

127. *Gregg*, 428 U.S. at 187 (Stewart, Powell & Stevens, JJ., concurring).

128. *Id.* at 195.

129. *Id.* at 196-98.

130. *Id.* at 204-06.

131. *Id.* at 206-07.

132. *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (Blackmun, J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 261 (1976) (Blackmun, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Blackmun, J., concurring).

133. *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

134. *Furman v. Georgia*, 408 U.S. 238, 413 (1972) (Blackmun, J., dissenting). See *supra* note 121 and accompanying text.

135. *Woodson*, 428 U.S. at 301 (opinion of Stewart, Powell, & Stevens, JJ.). Though Louisiana's mandatory death penalty statute was "somewhat narrower" than North Carolina's, the Court adopted much the same reasoning to invalidate the statute in *Stanislaus Roberts*, 428 U.S. at 332-36 (opinion of Stewart, Powell, & Stevens, JJ.).

136. *Woodson*, 428 U.S. at 302-03.

137. *Id.* at 303-04. In this discussion, the plurality cited Chief Justice Burger's dissenting opinion in *Furman*, but did not refer to Justice Blackmun's remarks in *Furman* concerning mandatory sentences. *Id.* at 288.

statutes.¹³⁸ In both cases, he wrote only a brief statement referring to his *Furman* opinion. He neither acknowledged the “fear,” expressed in *Furman*, that mandatory death penalty statutes would preclude any application of mercy,¹³⁹ nor explained how he had overcome that fear.

Another section of Louisiana’s mandatory death penalty statute was at issue the very next Term in a case also styled *Harry Roberts v. Louisiana*.¹⁴⁰ Relying on *Woodson*¹⁴¹ and *Stanislaus Roberts*,¹⁴² the Court held the Louisiana statute unconstitutional for failure to allow “consideration of particularized mitigating factors.”¹⁴³ Justice Blackmun again dissented, this time writing an opinion.¹⁴⁴ Declining to be bound by the plurality opinion in *Stanislaus Roberts* and rejecting the intervening decision in *Washington v. Louisiana*,¹⁴⁵ Justice Blackmun concluded that the subsection of the statute at issue in *Harry Roberts* “falls within that narrow category of homicide for which a mandatory death sentence is constitutional.”¹⁴⁶ Because *Harry Roberts* involved the narrowly defined crime of murder of a peace officer in performance of his duties, Justice Blackmun saw no room for “standardless jury discretion” to infect the sentence.¹⁴⁷ Moreover, he commented that “mitigating factors need not be considered in every case,”¹⁴⁸ a statement seemingly at odds with his remark in *Furman*.¹⁴⁹ Curiously, in *Harry Roberts* it is the per curiam opinion—not Blackmun’s dissent—that stresses the importance of focusing on the “particular offender or the particular offense.”¹⁵⁰

138. *Id.* at 307-08 (Blackmun, J., dissenting); *Stanislaus Roberts v. Louisiana*, 428 U.S. 325, 363 (1976) (Blackmun, J., dissenting).

139. *Furman v. Georgia*, 408 U.S. 238, 413 (1972) (Blackmun, J., dissenting).

140. 431 U.S. 633 (1977) (per curiam).

141. 428 U.S. 280 (1976).

142. 428 U.S. 325 (1976).

143. *Harry Roberts*, 431 U.S. at 637.

144. *Id.* at 638 (Blackmun, J., dissenting).

145. 428 U.S. 906 (1976). In *Washington*, the Court held unconstitutional the mandatory death sentence imposed under a different subsection of the same Louisiana statute, but did so in summary fashion, without benefit of full briefing and argument. See *Harry Roberts v. Louisiana*, 431 U.S. 633, 640 (1977) (Blackmun, J., dissenting).

146. *Harry Roberts*, 431 U.S. at 641 (Blackmun, J., dissenting). Justice Blackmun distinguishes murder “with specific intent to kill, or to inflict great bodily harm” while engaged in the perpetration of another felony from murder “with specific intent to kill or to inflict great bodily harm” upon a fireman or policemen engaged in performance of his duties. *Id.* at 639-40.

147. *Id.* at 641. Blackmun noted that even the majority left open the question of a mandatory death penalty for murder by a prisoner already serving a life sentence. *Id.*

148. *Id.*

149. *Furman v. Georgia*, 408 U.S. 238, 413 (1972) (Blackmun, J., dissenting).

150. *Harry Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam).

In sum, from the time he joined the Court in 1970 through 1977, Justice Blackmun voted regularly to uphold the death penalty.¹⁵¹ His position was undeniably harsh: he approved both standardless capital punishment schemes¹⁵² and mandatory death sentences.¹⁵³ Justice Blackmun's anguished comments in *Furman* are difficult to reconcile with his approval of schemes condemned by a majority of the Court¹⁵⁴ and with his lack of attention to evidence in mitigation of punishment.¹⁵⁵ In these early cases, Justice Blackmun's concept of his role as judge was a narrow one, circumscribed by doctrines such as separation of powers and by notions of judicial restraint. He focused on the legislative will to impose the penalty and reviewed deferentially the claims of individual defendants.

151. Justice Blackmun exhibited a similar tendency in cases in which he participated but did not write. He voted to uphold the penalty in *Dobbert v. Florida*, 432 U.S. 282 (1977) (Blackmun in majority); *Davis v. Georgia*, 429 U.S. 122 (1976) (Blackmun joining dissent) (1978); *Schick v. Reed*, 419 U.S. 256 (1974) (Blackmun in majority); and *McGautha v. California*, 402 U.S. 183 (1971) (Blackmun in majority), *vacated*, 408 U.S. 941 (1972). He voted to reject it in *Coker v. Georgia*, 433 U.S. 584 (1977), where Justice Blackmun joined the majority opinion in holding that the death penalty is unconstitutionally disproportionate to the crime of rape of an adult woman where no life was taken, and in *Gardner v. Florida*, 430 U.S. 349 (1977), where he concurred in the judgment vacating the death sentence on due process grounds, solely on the basis of the Court's decisions in *Woodson*, *Stanislaus Roberts*, and *Stewart v. Massachusetts*, 408 U.S. 845 (1972) (*per curiam*) (vacating the death sentence).

152. See *Furman* 408 U.S. at 413, (Blackmun, J., dissenting), and its companion cases; see also *McGautha*, 402 U.S. at 183. *McGautha*'s sentence was later characterized as having been imposed under a "standardless" system. *Stanislaus Roberts v. Louisiana*, 428 U.S. 325, 347-48 (1976) (White, J., dissenting).

153. See, e.g., *Harry Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (Blackmun, J., dissenting); *Stanislaus Roberts*, 428 U.S. at 363 (Blackmun, J., dissenting); *Woodson v. North Carolina*, 428 U.S. 280, 307 (1976) (Blackmun, J., dissenting).

154. See *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (opinion of Douglas, J.) (discussing discretionary statutes); *id.* at 309-10 (opinion of Stewart, J.) (discussing the capricious imposition of death penalty); *id.* at 313 (opinion of White, J.) (describing the infrequent imposition of penalty); *id.* at 364-66 (opinion of Marshall, J.) (discussing discriminatory imposition).

155. *Harry Roberts*, 431 U.S. at 641; see also *Stanislaus Roberts*, 428 U.S. at 363; *Woodson*, 428 U.S. at 307 (Justice Blackmun voting to approve mandatory death sentences).

D. Lockett and Beyond

Though it marks neither the first time Justice Blackmun voted to invalidate the death penalty¹⁵⁶ nor the last time he voted to uphold it,¹⁵⁷ *Lockett v. Ohio*¹⁵⁸ represents the beginning of Justice Blackmun's "epiphany." In the felony murder case of a non-triggerman accomplice, Blackmun concurred in the judgment invalidating the death sentence.¹⁵⁹ Justice Blackmun would have required that the sentencer "have discretion to consider the degree of the defendant's participation in the acts leading to the homicide" as well as the "character of the defendant's mens rea."¹⁶⁰

Justice Blackmun's rationale in *Lockett* was more restrictive than the plurality's.¹⁶¹ Nevertheless, he recognized that his vote to invalidate the death penalty in *Lockett* departed from his earlier opinions. Justice Blackmun stated:

Though heretofore I have been unwilling to interfere with the legislative judgment of the states in regard to capital-sentencing procedures, . . . [this case] provides a significant occasion for setting some limit to the method by which the states assess punishment for actions less immediately connected to the deliberate taking of human life.¹⁶²

Justice Blackmun did not say exactly why *Lockett* provided the occasion for change. He disagreed with the plurality's view that the sentencer must be permitted to consider any relevant mitigating evidence¹⁶³ but found that the

156. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965), cert. denied 384 U.S. 1019 (1966); *Bailey v. Henslee*, 287 F.2d 936 (8th Cir.), cert. denied, 368 U.S. 877 (1961).

157. See, e.g., *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Baldwin v. Alabama*, 472 U.S. 372 (1985), cert. denied, 493 U.S. 874 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984), cert. denied, 516 U.S. 1053 (1996).

158. 438 U.S. 586 (1978).

159. *Id.* at 613 (Blackmun, J., concurring in part and in judgment). In *Bell v. Ohio*, 438 U.S. 637 (1978), decided the same day, Blackmun concurred in the judgment invalidating the death sentence of another aider and abettor for the reasons stated in his *Lockett* opinion. *Bell*, 438 U.S. at 643 (Blackmun, J., concurring).

160. *Lockett*, 438 U.S. at 615 (Blackmun, J., concurring in part and in judgment).

161. *Id.* (emphasizing defendant's participation and intent); see *id.* at 606 (opinion of Burger, C.J., and Stewart, Powell, & Stevens, JJ.) (requiring individualized consideration of mitigating factors); *id.* at 621, 624-28 (White, J., concurring in part, dissenting in part, and concurring in judgment) (advocating application of proportionality theory employed in *Coker v. Georgia*, 433 U.S. 584 (1977), to invalidate death penalty for crime of rape where no life was taken).

162. *Id.* at 616 (noting that most states consider the degree of defendant's participation when assessing punishment).

163. *Id.* at 613 (declining to join Part III of the plurality opinion).

application of the death penalty to Lockett was "particularly harsh" in view of her limited involvement in the homicide.¹⁶⁴ One might speculate that he was troubled by the fact that the actual triggerman, who pleaded guilty, received a lesser sentence.¹⁶⁵ It may be that, however the sentences were determined, Justice Blackmun simply could not abide the imposition of the death sentence on a mere abettor while the triggerman received a lesser penalty. This speculation squares with his emphasis on the defendant's specific role in the homicide, rather than consideration of any relevant mitigating evidence. Moreover, Justice Blackmun raised the issue, not addressed by the plurality, that Ohio law permitted the sentencer to avoid imposing the death penalty if defendant pleaded guilty.¹⁶⁶ For Justice Blackmun, this amounted to forcing the defendant to bargain away the right to a jury trial to avert the risk of a death sentence, a choice he found foreclosed by *United States v. Jackson*.¹⁶⁷

Justice Blackmun's opinion in *Lockett* thus foretells his later focus on the individual defendant and on the protection of constitutional rights surrounding trial and sentencing. But its narrow rationale and unremarkable tone offer little reason to suspect that, from *Lockett* forward, Justice Blackmun would only rarely vote to uphold a sentence of death. In fact, following *Lockett*, Justice Blackmun voted to uphold the penalty only three times¹⁶⁸ in cases where he wrote an opinion, while invalidating it thirty-two times.¹⁶⁹ In all post-*Lockett* cases, Justice Blackmun voted to uphold the penalty in eighteen cases and to reject it in eighty-two.¹⁷⁰ Justice Blackmun's "transformation" was essentially complete by 1986,¹⁷¹ eight years before his dramatic announcement in *Callins*.¹⁷²

164. *Id.* Justice Blackmun returned to this theme in *McCullum v. North Carolina*, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting), where he noted that although *McCullum* was "far from the most culpable of the four accomplices . . . he was the only one convicted of murder and the only one sentenced to die."

165. *Lockett v. Ohio*, 438 U.S. 586, 591 (1978).

166. *Id.* at 618 (Blackmun, J., concurring in part and in judgment).

167. *Id.* at 617-19 (discussing *United States v. Jackson*, 390 U.S. 570 (1968)).

168. *Sawyer v. Whitley*, 505 U.S. 333, 350-51 (1992) (Blackmun, J., concurring) (concurring in the judgment on grounds that defendant had not established actual innocence, but harshly criticizing the Court's "unduly cramped view of actual innocence"); *Baldwin v. Alabama*, 472 U.S. 372 (1985), *cert. denied*, 493 U.S. 874 (1989); *Spaziano v. Florida*, 468 U.S. 447, 467 (1984), *cert. denied*, 516 U.S. 1053 (1996).

169. See Appendix I, *infra* page 924. This figure excludes cases in which Blackmun acted as Circuit Judge for the Eighth Circuit, memorandum decisions on applications for stay of execution, and the like.

170. This represents 82% "no" votes. See Appendix I, *infra* page 924.

171. See Appendix I; see also Stephenson, *supra* note 2, at 316 (noting that Blackmun's voting record in capital cases after the mid-1980's nearly matched Brennan's and Marshall's).

172. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

Given the large number of death penalty cases after *Lockett*, this section attempts only to outline broadly Justice Blackmun's "pilgrimage."¹⁷³ It separates the cases into the three strands that, by the end of his tenure, had come to matter most to Justice Blackmun: individualized sentencing, procedural safeguards, and meaningful federal review.¹⁷⁴

1. Individualized Sentencing

A plurality of the Court in *Lockett* articulated the "conclusion that an individualized decision is essential in capital cases" owing to the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."¹⁷⁵ As noted above, Justice Blackmun declined to join this portion of the opinion. Blackmun also declined to join the majority in *Eddings v. Oklahoma*,¹⁷⁶ the 1982 case which solidified *Lockett* and "married" *Furman* with *Lockett*.¹⁷⁷ *Eddings* vacated the death sentence of a defendant who was sixteen years old at the time of the killing and who presented considerable evidence of a troubled childhood.¹⁷⁸ The trial judge considered only *Eddings*' youth and not his "unhappy upbringing and emotional disturbance" in mitigation.¹⁷⁹ The Court held that the "background and mental and emotional development of a youthful defendant [must] be duly considered in sentencing."¹⁸⁰ Justice Blackmun simply joined Chief Justice Burger's dissenting opinion, so his own analysis is difficult to determine. Burger complained that the Court had not granted certiorari on the issue decided,¹⁸¹ and interpreted the trial judge's statements as indicating that he had, in fact,

173. See Stephenson, *supra* note 2, at 271 (using the term "pilgrimage" to describe Justice Blackmun's voting record in death penalty cases).

174. Cf. Stephenson, *supra* note 2, at 312-13 (describing three governing principles at end of Blackmun's career: (1) importance of procedural safeguards, (2) avoidance of arbitrary and capricious imposition of penalty, and (3) availability of federal review). These three strands roughly correlate with specific periods in the post-*Lockett* evolution of death penalty jurisprudence generally. That is, in the several years following *Gregg*, most cases turned on questions of the constitutional parameters of individualized sentencing. By the early 1980s, cases began to present issues involving the adequacy of procedures used at trial and sentencing. Toward the end of the decade and into the 1990s, many cases involved issues of the availability of federal review, especially on successive, abusive, or defaulted habeas petitions.

175. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

176. 455 U.S. 104 (1982).

177. Coyne, *supra* note 1, at 405.

178. *Eddings*, 455 U.S. at 107-08.

179. *Id.* at 109.

180. *Id.* at 116.

181. *Id.* at 120 (Burger, C.J., dissenting).

considered the defendant's family history in mitigation.¹⁸² The Chief Justice concluded, in a comment reminiscent of Blackmun's statement in *Furman*, that individual Justices would not themselves have imposed the death penalty in this case.¹⁸³ But the Court's duty, he said, is not "to determine whether sentences imposed by state courts are . . . appropriate; [its] only authority is to decide whether they are constitutional under the Eighth Amendment."¹⁸⁴ Finding no violation of *Lockett*, the dissenters, including Justice Blackmun, voted to affirm the sentence.¹⁸⁵

Given this background, one of the most startling Blackmun opinions in this line of cases comes in *Sumner v. Shuman*,¹⁸⁶ in which the Court invalidated a mandatory death sentence for an inmate already under life sentence without possibility of parole. Writing for the Court, Justice Blackmun recited the requirement of individualized sentencing¹⁸⁷ and noted that even this apparently narrow class of murderers represented a wide range of circumstances and degrees of responsibility.¹⁸⁸ Before concluding that "a departure from the individualized capital-sentencing doctrine is not justified"¹⁸⁹ even in this narrow category of cases, Justice Blackmun retraced the development of death penalty law from *Furman* on.¹⁹⁰ He noted specifically that only in *Eddings* did a majority of the Court adopt the *Lockett* plurality's approach.¹⁹¹ And only in *Hitchcock v. Dugger*,¹⁹² decided the same Term as *Shuman*, did the Court "unequivocally rel[y] on the rulings in *Lockett v. Ohio*, and *Eddings v. Oklahoma*, that the Eighth and Fourteenth Amendments require that the sentencing authority be permitted to consider any relevant mitigating evidence before imposing a death sentence."¹⁹³

Justice Blackmun never departed thereafter from the individualized sentencing mandate. Dissenting in *Walton v. Arizona*,¹⁹⁴ Justice Blackmun rejected the contention that Arizona was permitted to "impose[] on defendants the burden of establishing, by a preponderance of the evidence, the existence of

182. *Id.* at 123-26.

183. *Id.* at 127-28.

184. *Id.* at 128 (quotation marks omitted).

185. *Id.*

186. 483 U.S. 66 (1987).

187. *Id.* at 75.

188. *Id.* at 79-80.

189. *Id.* at 78.

190. *Id.* at 73-76.

191. *Id.* at 76.

192. 481 U.S. 393 (1987).

193. *Sumner v. Shuman*, 483 U.S. 66, 76 (1987). See also *id.* at 76 n.5 (describing two other cases decided shortly before *Shuman* and solidifying the *Lockett-Eddings* requirement of individualized sentencing).

194. 497 U.S. 639 (1990).

mitigating circumstances sufficiently substantial to call for leniency.”¹⁹⁵ Justice Blackmun returned to the principles of *Lockett* and *Eddings*, emphasizing their roots in the premise “that death is . . . different from all other sanctions in kind rather than degree.”¹⁹⁶ He found the “[a]pplication of the preponderance standard . . . especially problematic in light of the fact that the ‘existence’ of a mitigating factor frequently is not a factual issue to which a ‘yes’ or ‘no’ answer can be given.”¹⁹⁷ Justice Blackmun objected to the proposition that mitigating evidence merits consideration only when “some vaguely defined threshold of ‘significance’ has been reached.”¹⁹⁸ He concluded that “[u]nder the guise of a burden of proof, [Arizona’s] statute provides that some mitigating evidence is not to be considered at all.”¹⁹⁹ Blackmun distinguished the State’s admitted interest in requiring defendants to prove affirmative defenses, noting that such defenses present the sentencer with a “binary choice,” whereas the sentencer is free to accord mitigating evidence whatever weight it deserves.²⁰⁰ In his view, Arizona’s allocation of the burden of proof clearly violated *Lockett*’s requirement that the sentencer be allowed to consider *any* relevant mitigating evidence.²⁰¹

By the time of his retirement, Justice Blackmun’s frustration with the Court’s handling of individualized sentencing was overwhelming. Announcing his conclusion in *Callins v. Collins*²⁰² that the death penalty could not be fairly imposed, Blackmun described a seemingly insoluble problem: “[E]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing.”²⁰³ Justice Blackmun’s opinions bear out his insistence that both *Furman* and *Lockett* be applied. Early on—actually, until *Eddings* was decided over his dissent—Blackmun emphasized *Furman*’s mandate of consistent application. This stance emerged most clearly in the cases

195. *Id.* at 649 (opinion of White, Rehnquist, O’Connor & Kennedy, JJ., as to this issue).

196. *Id.* at 682 (Blackmun, J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976)).

197. *Id.*

198. *Id.* at 683.

199. *Id.* at 683-84.

200. *Id.* at 685.

201. *Id.* at 686 (emphasis added). Two years earlier, in *Mills v. Maryland*, 486 U.S. 367, 384 (1988), Justice Blackmun’s majority opinion held that the State could not require that the jury unanimously find the existence of any mitigating factor. A similar issue arose in *McKoy v. North Carolina*, 494 U.S. 433 (1990). There Justice Blackmun’s concurring opinion reaffirmed his commitment to *Mills*. *McKoy*, 499 U.S. at 445-52 (Blackmun, J., concurring).

202. 510 U.S. 1141 (1994).

203. *Id.* at 1144 (Blackmun, J., dissenting).

where Justice Blackmun voted to uphold mandatory death sentences—a sure cure, it seemed, for unbridled discretion in sentencing.²⁰⁴ Later, the need for consistent application of the penalty was at the heart of Justice Blackmun's discomfort with the stark statistical evidence of racial discrimination presented in *McCleskey v. Kemp*.²⁰⁵ And Justice Blackmun's opinions in cases involving statutory aggravating factors attempt to implement *Furman*'s command that the sentencer's discretion be carefully channeled.²⁰⁶ He accepted *Gregg*'s premise that aggravating factors could operate to distinguish, in a principled way, crimes suitable for punishment by death from crimes not so horrible. When he voted to reject the death penalty in aggravating factor cases, he did so because the factors themselves, or the courts' construction of them, were so broad as to fail in the task of narrowing the class of death-eligible defendants.

Nevertheless, Justice Blackmun's opinions on the whole convey a sense that, were he to choose between *Furman* and *Lockett* in reviewing death penalty cases (rather than rejecting capital punishment as he did in *Callins*), *Lockett*'s

204. See, e.g., *Harry Roberts v. Louisiana*, 431 U.S. 633, 638-42 (1977) (Blackmun, J., dissenting) (voting to uphold mandatory death sentences); *Stanislaus Roberts v. Louisiana*, 428 U.S. 325, 363 (1976) (Blackmun, J., dissenting) (same); *Woodson v. North Carolina*, 428 U.S. 280, 307-24 (1976) (Blackmun, J., dissenting) (same). In *Harry Roberts*, the Court made much of the need to focus on the particular defendant; no such focus appears in Blackmun's dissenting opinion.

205. *McCleskey v. Kemp*, 481 U.S. 279, 355 (1987) (Blackmun, J., dissenting) (noting that statistically, race of victim is "more important in explaining the imposition of a death sentence" than defendant's role in homicide, but that race is an impermissible aggravating factor); *id.* at 365 (arguing that "narrowing the class of death-eligible defendants is not too high a price to pay for a death penalty system that does not discriminate on the basis of race"). See also *Tuilaepa v. California*, 512 U.S. 967, 991-92 (1994) (Blackmun, J., dissenting) (noting that "[o]ne of the greatest evils of leaving jurors with largely unguided discretion is the risk that this discretion will be exercised on the basis of constitutionally impermissible considerations — primary among them, race"). But see *Callins v. Collins*, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting from denial of certiorari) (acknowledging that the "arbitrariness inherent in the sentencer's discretion to afford mercy" is also affected by race).

206. See, e.g., *Tuilaepa*, 512 U.S. at 984-91 (Blackmun, J., dissenting) (arguing that prosecutors use the "circumstances of the crime" aggravator to "embrace the entire spectrum of facts present in virtually every homicide" and concluding that the challenged factors "fail to guide the sentencer's discretion"); *Arave v. Creech*, 507 U.S. 463, 487 (1993) (Blackmun, J., dissenting) (objecting to the majority's acceptance of a broad construction of the "utter disregard for human life" aggravator, noting that the accepted construction "sweepingly includes every murder committed that is without 'conscientious scruples against killing'" and failing to imagine *any* murder that would not fall within that construction); *Lewis v. Jeffers*, 497 U.S. 764, 787-97 (1990) (Blackmun, J., dissenting) (discussing an "especially heinous . . . or depraved" aggravating circumstance, concluding that the state court had not sufficiently narrowed it and would consider *especially* heinous virtually *any* murder, and criticizing majority's lenient standard of review) (emphasis added).

mandate of individualized sentencing would prevail.²⁰⁷ Justice Blackmun's dissent in *California v. Brown*,²⁰⁸ in which the Court upheld an instruction that the jury not be swayed by "mere sympathy" for the defendant, embodies this concern:

In a capital sentencing proceeding, the sentencer's discretion must be guided to avoid arbitrary or irrational decisions This Court, however, has recognized and even safeguarded the sentencer's power to exercise its mercy to spare the defendant's life The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of "contemporary values," . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value I cannot accept, in light of the special role of mercy in capital sentencing . . . [an instruction that may arrest or restrain this humane response].²⁰⁹

Justice Blackmun's commitment to the individualized sentencing requirement, including the opportunity to exercise mercy toward each defendant, is a strong thread leading to his rejection of the death penalty.

2. Procedural Safeguards

Justice Blackmun fervently believed that "there is a heightened need for fairness in the administration of death."²¹⁰ He wrote in *Sawyer v. Whitley*,²¹¹ and reiterated in *Callins*, that his willingness to uphold the death penalty, "notwithstanding [his] own deep moral reservations . . . has always rested on an understanding that certain procedural safeguards . . . would ensure that death

207. This sense emerges not only from substance but also from style, especially Blackmun's emphasis on facts, e.g., *Feguer v. United States*, 302 F.2d 214, 217-36 (8th Cir.) *cert. denied*, 371 U.S. 872 (1962), and his personalization of the facts and the defendant, e.g., *Callins*, 510 U.S. at 1143-59 (Blackmun, J., dissenting from denial of certiorari).

208. 479 U.S. 538 (1987).

209. *Id.* at 562-63 (Blackmun, J., dissenting).

210. *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (Blackmun, J., dissenting from denial of certiorari).

211. *Sawyer v. Whitley*, 505 U.S. 333, 358 (1992) (Blackmun, J., concurring) (referring in particular to federal habeas review).

sentences are fairly imposed.”²¹² The *Gregg* plurality stressed that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority” is given adequate information and guidance.²¹³ Once the death penalty had been re-established in the 1976 cases and its constitutional contours further delineated in the *Lockett* line of cases, death penalty challenges turned increasingly on the validity of the particular procedures by which defendants had been convicted of capital crimes and sentenced to die. Time after time, Justice Blackmun found the procedures wanting.

It may be helpful, in establishing a point of departure, to begin with two opinions in which Justice Blackmun approved death sentencing procedures. In *Spaziano v. Florida*, Justice Blackmun, writing for the Court, upheld an unusual death sentencing procedure in which the jury issued an advisory recommendation for life imprisonment or death, and the trial court then independently weighed the aggravating and mitigating circumstances and entered the sentence it deemed appropriate.²¹⁴ Justice Blackmun specifically noted that the right to a jury—so fundamental a protection at the trial stage—is not present at sentencing.²¹⁵ Significantly, Blackmun stated:

While it is to be hoped that current procedures have greatly reduced the risk that jury sentencing will result in arbitrary or discriminatory application of the death penalty, there certainly is nothing in the safeguards necessitated by the Court’s recognition of the qualitative difference of the death penalty that *requires* that the sentence be imposed by a jury.²¹⁶

He found adequate protection in Florida’s requirement that, before imposing a death sentence, the trial judge set forth his findings in writing, and that the Florida Supreme Court review every death sentence for arbitrary or capricious imposition.²¹⁷ Justice Blackmun also dismissed the contention that because the vast majority of states required the jury to determine the sentence in capital cases, Florida must do likewise.²¹⁸

212. *Callins*, 510 U.S. at 1157 (Blackmun, J., dissenting from denial of certiorari) (quoting *Sawyer*, 505 U.S. at 358 (Blackmun, J., concurring)).

213. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

214. 468 U.S. 447 (1984).

215. *Id.* at 459.

216. *Id.* at 460 (citation omitted). Conversely, Justice Stevens, joined by Justices Brennan and Marshall, was “convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.” *Id.* at 469 (Stevens, J., concurring in part and dissenting in part).

217. *Id.* at 466.

218. *Id.* at 464.

The next year, Justice Blackmun wrote another majority opinion upholding a statute providing sentencing roles for both jury and judge.²¹⁹ Alabama, at the time, required the jury, upon convicting defendant of an aggravated offense, to return a sentence of death, but also required the trial judge to hear and weigh evidence of aggravating and mitigating factors, and then to sentence the defendant either to life imprisonment or death.²²⁰ Justice Blackmun rejected petitioner's argument that this scheme violated *Furman* by "'blur[ring]' the issue of guilt with the issue whether death is the appropriate punishment."²²¹ Here, Justice Blackmun noted, the jury's role was limited to finding the defendant guilty of a capital crime, while the judge alone weighed aggravating and mitigating circumstances in fixing punishment.²²² He asserted that Alabama's scheme had not been arbitrarily applied²²³ and, citing *Spaziano*, reiterated that weird schemes were not necessarily unconstitutional.²²⁴

The *Spaziano/Baldwin* exception aside, Justice Blackmun's opinions describe a plethora of procedural defects in capital cases. On the issue of who bears the responsibility for sentencing, Blackmun's views were further elaborated in later cases. He issued a vehement dissent in *Cabana v. Bullock*,²²⁵ a case in which the Court allowed a state appellate court to salvage a sentence imposed in violation of *Enmund v. Florida*²²⁶ by itself making the *Enmund* finding. Citing *Spaziano*, Justice Blackmun reaffirmed that a death sentence need not be imposed by the jury, but insisted that it be imposed—and the requisite findings made—at the trial level.²²⁷ He recalled *Gregg*'s reliance on the "important additional safeguard" of appellate review.²²⁸ He objected that the Court's ruling, which "permit[s] States to collapse factfinding and review into one proceeding[,] . . . abandon[s] one of the most critical protections afforded by every capital-sentencing scheme to which the Court previously has given its approval."²²⁹ Concluding that a reasonable jury *could* have found that the

219. *Baldwin v. Alabama*, 472 U.S. 372, 389-90 (1985), *cert. denied*, 493 U.S. 874 (1989).

220. Because the jury's sentence was not dispositive, this scheme did not run afoul of *Woodson*'s mandatory death sentence prohibition. *Id.* at 379-80.

221. *Id.* at 388.

222. *Id.*

223. Arbitrariness was the vice *Furman*, *Woodson*, and other cases sought to eradicate. *Baldwin*, 472 U.S. at 388-89.

224. *Id.* at 389.

225. 474 U.S. 376 (1986).

226. 458 U.S. 782, 801 (1982) (requiring the jury to find specifically that the defendant either committed, or attempted or intended to commit, the homicide).

227. *Bullock*, 474 U.S. at 401 (Blackmun, J., dissenting) (citing *Spaziano v. Florida*, 468 U.S. 447 (1984), *cert. denied*, 516 U.S. 1053 (1996)).

228. *Id.* at 404 (citing *Jurek v. Texas*, 428 U.S. 262, 269, 276 (1976); *Proffitt v. Florida* 428 U.S. 242, 251 (1976); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976)).

229. *Id.* Justice Blackmun stressed the importance of the Court's decision just the

defendant killed, attempted to kill, or intended to kill, "hardly . . . guarantee[s] that this jury *did*" so find.²³⁰ In Justice Blackmun's view, "every defendant is entitled to that guarantee."²³¹

Justice Blackmun also found fault with the allocation of sentencing responsibility in *Clemons v. Mississippi*.²³² Though concurring in the judgment vacating the death sentence, Blackmun dissented from the majority's "gratuitous suggestion" that a state appellate court on remand "may 'salvage' Clemons' death sentence by performing its own weighing of aggravating and mitigating circumstances."²³³ Justice Blackmun stressed the disparate functions of trial and appellate courts,²³⁴ observing that:

If a jury's verdict rests in part upon a constitutionally impermissible aggravating factor, and the State's appellate court upholds the death sentence based upon its own reweighing of legitimate aggravating and mitigating circumstances, the appellate Court, in any real sense, has not approved or affirmed the verdict of the jury.²³⁵

He further noted that defendants have a *constitutional* right to present their cases directly to the factfinder.²³⁶ Discussing *Spaziano*,²³⁷ Justice Blackmun again insisted that while sentencing "by a trial judge *who has witnessed the testimony*" is permissible, sentencing by an appellate court on the basis of a cold record is not.²³⁸ He insisted that appellate review of the sentencing phase be available, thus precluding the appellate court from imposing sentence itself.

Justice Blackmun also delineated the application of the Double Jeopardy Clause to capital sentencing. Writing for the Court in 1981, he held that the State could not seek the death penalty in defendant's second trial when the jury

year before, in *Caldwell v. Mississippi*, 472 U.S. 320, 328 (1985), setting constitutional limits on an appellate court's role in sentencing. He noted in particular the importance to the sentencer of hearing the evidence and arguments and seeing the witnesses, and the difficulty of gleaning intangible elements relating to "compassionate or mitigating factors" from a cold record on appeal. *Cabana v. Bullock*, 474 U.S. 376, 394 (1986) (Blackmun, J., dissenting).

230. *Bullock*, 474 U.S. at 407 (Blackmun, J., dissenting).

231. *Id.*

232. 494 U.S. 738 (1990).

233. *Id.* at 756 (Blackmun, J., concurring in part and dissenting in part) (quotation marks omitted).

234. *Id.* at 768.

235. *Id.* at 762.

236. *Id.* at 769 (citing *Rock v. Arkansas*, 483 U.S. 44, 51 n.8 (1987); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

237. *Spaziano v. Florida*, 468 U.S. 447 (1984), *cert. denied*, 516 U.S. 1053 (1996).

238. *Clemons v. Mississippi*, 494 U.S. 738, 765 (1990) (Blackmun, J., concurring in part and dissenting in part).

in the first trial chose life in prison, not death, as the appropriate sentence.²³⁹ Because the jury had only two sentencing options, *Bullington v. Missouri* was analogous to cases precluding retrial of defendant on a higher charge following conviction only for a lesser included offense.²⁴⁰ Justice Blackmun would have extended *Bullington* in *Schiro v. Farley*.²⁴¹ There the majority, distinguishing *Bullington*, held that the trial judge's imposition of the death penalty, over the jury's recommendation of a life sentence upon failure to convict Schiro on the intentional murder charge, did not subject Schiro to a second death penalty hearing.²⁴² Justice Blackmun, on the other hand, found *Bullington* controlling.²⁴³ Blackmun believed that defendant's acquittal on the intentional murder charge barred the prosecution from proving at sentencing phase—as it would have had to do—the intentional murder aggravating circumstance.²⁴⁴ He observed that the “‘trial-like’ nature” of the sentencing proceeding is “analogous to guilt-phase proceedings and thus bring[s] the Double Jeopardy Clause into play.”²⁴⁵ In other words, it violates the Double Jeopardy Clause to allow the trial judge to “base a capital sentence on a factual predicate that the jury has rejected.”²⁴⁶

Another fundamental protection Blackmun sought to enforce was the right to be tried only if competent.²⁴⁷ California required a defendant to prove, by a preponderance of the evidence, his incompetence to stand trial. In *Medina v. California*, the Court approved this allocation of the burden of proof.²⁴⁸ Justice Blackmun rejected the Court's conclusion that defendant's entitlement to assistance of counsel and to a psychiatric examination, together with a competency hearing, were enough to meet the fundamental fairness standard.²⁴⁹ According to Blackmun, the Court “mistaken[ly] . . . severs two integrally

239. *Bullington v. Missouri*, 451 U.S. 430, 446 (1981) (appeal following retrial ordered on basis of *Duren v. Missouri*, 439 U.S. 357 (1979), which disallowed automatic exemption of women from jury service).

240. *Id.* at 442 (citing *Burks v. United States*, 437 U.S. 1, 15-16 (1978)).

241. 510 U.S. 222 (1994).

242. *Id.* at 230-32.

243. *Id.* at 237-38 (Blackmun, J., dissenting).

244. *Id.* at 238.

245. *Id.*

246. *Id.* at 243 (Stevens, J., dissenting) (distinguishing capital from non-capital sentencing).

247. *Medina v. California*, 505 U.S. 437, 457-58 (1992) (Blackmun, J. dissenting) (terming this right “fundamental to an adversary system of justice” and a “foundational right for the effective exercise of a defendant's other rights in a criminal trial”).

248. *Id.* at 452. The Court also approved the State's presumption of competence. *Id.* at 452-53.

249. *Id.* at 462 (Blackmun, J., dissenting); see also *id.* at 468 (arguing that “the constitutional prohibition against convicting incompetent persons” cannot be termed “‘fundamental’ if the State is at liberty to go forward with a trial when the evidence of competence is inconclusive”).

related procedural rights:" the right not to be tried while incompetent and the right not to bear the burden of proof of incompetence.²⁵⁰ To Justice Blackmun, "requiring a possibly incompetent person to carry the burden of proving that he is incompetent cannot be called 'adequate' . . . to protect [his] right to be tried only while competent."²⁵¹ Noting that competency evaluations are mostly guesswork, Blackmun insisted that due process requires that steps be taken to avoid trying a defendant where the evidence of competence is inconclusive.²⁵² Justice Blackmun struck the balance between the state's interests and defendant's rights in favor of the defendant on the theory that "the individual should not be asked to share equally with society the risk of error when the possible injury to [him] is significantly greater than any possible harm to the state."²⁵³

The admission of unreliable evidence also troubled Justice Blackmun. For example, he condemned the admission of psychiatric evidence of defendant's future dangerousness (needed to prove an aggravating factor) when the American Psychiatric Association itself suggested that "two out of three predictions of long-term future violence made by psychiatrists are wrong."²⁵⁴ Such evidence cannot be "justified as advancing the search for truth."²⁵⁵ Justice Blackmun noted that "unreliable scientific evidence is widely acknowledged to be prejudicial,"²⁵⁶ and that jurors cannot be expected "to separate valid from invalid expert opinions."²⁵⁷ In capital cases, he believed "a requirement of greater reliability should prevail."²⁵⁸ Surely, he concluded, "this Court's commitment to ensuring that death sentences are imposed reliably and reasonably requires that nonprobative and highly prejudicial testimony on the ultimate question of life or death be excluded from a capital sentencing hearing."²⁵⁹ Justice Blackmun returned to this theme a few years later in *Satterwhite v. Texas*.²⁶⁰ There, psychiatric evidence of future dangerousness was obtained in an examination where defendant was not represented by counsel. This Sixth Amendment violation could not be treated as harmless error, Blackmun believed, particularly where "the jury must answer the very question that the psychiatrist purports to answer."²⁶¹

250. *Id.* at 459.

251. *Id.* at 463.

252. *Id.* at 466.

253. *Id.* at 467 (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)).

254. *Barefoot v. Estelle*, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting).

255. *Id.* at 928.

256. *Id.* at 926.

257. *Id.* at 929.

258. *Id.* at 916.

259. *Id.* at 929.

260. *Satterwhite v. Texas*, 486 U.S. 249, 267 (1988) (Blackmun, J., concurring in part and in judgment).

261. *Id.*

Likewise, Justice Blackmun condemned prosecutorial tactics he viewed as misconduct. A particularly strong statement comes in his dissent in *Darden v. Wainwright* on the issue of improper closing argument.²⁶² The majority observed that every court reviewing the prosecutor's closing argument had condemned it, but the Court went on to hold that the argument did not render Darden's trial unfair.²⁶³ Justice Blackmun found the argument to be a "calculated and sustained attempt to inflame the jury" and refused to disregard it as inconsequential.²⁶⁴ Moreover, he found other evidence in the case "sufficiently problematic" to raise doubts that the jury would have convicted Darden were it not for the prosecutor's "egregious summation."²⁶⁵ Justice Blackmun decried the Court's "attitude of helpless piety" in lamenting improper summations but affirming convictions based on them.²⁶⁶

Justice Blackmun also insisted that the jury be accurately informed about sentencing possibilities. In *California v. Ramos*,²⁶⁷ the Court approved an instruction that allowed the jury to consider the Governor's power to commute a life sentence (even a life sentence without possibility of parole). Justice Blackmun joined Justice Marshall's dissent, which found the instruction unconstitutional because it misleads the jury by failing to mention that the Governor can also commute a death sentence.²⁶⁸ The instruction, the dissenters believed, not only gives the jury a false dilemma in sentencing, but also "invites the imposition of the death penalty on the basis of mere speculation."²⁶⁹ Much later, Justice Blackmun wrote, for a plurality of the Court, an opinion holding that where defendant's future dangerousness is at issue and state law prohibits his release on parole, due process requires that he be allowed to inform the

262. *Darden v. Wainwright*, 477 U.S. 168, 188-200 (1986) (Blackmun, J., dissenting).

263. *Id.* at 179-81.

264. *Id.* at 193.

265. *Id.* at 197.

266. *Id.* at 205-06 (quoting *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946); citing *United States v. Young*, 470 U.S. 1 (1985)).

267. 463 U.S. 992, 1003 (1983) (noting that such instruction "invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society").

268. *Id.* at 1015 (Marshall, J., dissenting).

269. *Id.* at 1018. Justice Blackmun wrote separately to chastise the majority for "redefin[ing]" the question of the defendant's future dangerousness in terms of the probability that the Governor would commute the life sentence. *Id.* at 1029 (Blackmun, J., dissenting). In so doing, he said, the Court compounded the unfairness of the instruction itself. *Id.*

sentencing jury that he is ineligible for parole.²⁷⁰ Failure to so inform the jury would create a false choice between death and limited incarceration.²⁷¹

Justice Blackmun's bottom line was that "when a State chooses to impose capital punishment, . . . it must be imposed by the rule of law."²⁷² In *Barclay*, Justice Blackmun's brief dissent simply noted:

The errors and missteps—intentional or otherwise—come close to making a mockery of the Florida statute and are too much for me to condone. Petitioner Barclay, reprehensible as his conduct may have been, deserves to have a sentencing hearing and appellate review free of such misapplication of law, and in line with the pronouncements of this Court The end does not justify the means even in what may be deemed to be a "deserving" capital punishment situation.²⁷³

In case after case (including many not mentioned in this Article), trial and sentencing procedures failed to measure up to Justice Blackmun's exacting standards. Lacking confidence that state and federal courts would follow procedures designed to ensure fair trials and sentencing proceedings, Justice Blackmun almost always rejected the ultimate penalty.

3. Meaningful Review

Justice Blackmun once described appellate review as "one of the most critical protections" for capital defendants.²⁷⁴ In *Gregg*, the plurality noted that Georgia's "provision for appellate review . . . serves as a check against the random or arbitrary imposition of the death penalty."²⁷⁵ This protection was so important to Blackmun that it became an independent thread in his rejection of capital punishment. Though this strand appears occasionally in the early post-*Gregg* cases, it figures most prominently in death penalty cases decided near the end of Justice Blackmun's active service on the Court.²⁷⁶

One early hint of the importance to Justice Blackmun of appellate review came in *Maggio v. Williams*.²⁷⁷ In *Williams*, the Court vacated a stay of execution notwithstanding the pendency of a case on certiorari raising issues

270. *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994).

271. *Id.* at 161.

272. *Barclay v. Florida*, 463 U.S. 939, 991 (1983) (Blackmun, J., dissenting).

273. *Id.*

274. *Cabana v. Bullock*, 474 U.S. 376, 404 (1986).

275. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

276. An early hint of Blackmun's view that searching appellate review is required appeared in *Feguer v. United States*, 302 F.2d 217 (8th Cir.), cert. denied, 371 U.S. 872 (1962). See *supra* note 70 and accompanying text.

277. 464 U.S. 46 (1983) (per curiam).

related to Williams' claims.²⁷⁸ The Court seemed impatient with Williams' repeated filings in state and federal courts²⁷⁹ and was content with the lower federal courts' determination that his claims were meritless.²⁸⁰ Justice Blackmun's brief dissent emphasized the impropriety of the Court's "untoward rush to judgment in a capital case."²⁸¹ Justice Blackmun thought the Court should affirm the stay of execution until it resolved *Pulley v. Harris*, the pending case he felt sure would have some bearing on Williams' proportionality claim.²⁸² For Justice Blackmun, extending the stay until the issue was decided was a small price to pay in a capital case; instead the Court "summarily decide[d] the issue against Williams."²⁸³

Justice Blackmun's opinions suggest not only that review must be available, but that it must be searching. In *Gray v. Mississippi*²⁸⁴ and *Satterwhite v. Texas*,²⁸⁵ Justice Blackmun objected to harmless error analysis of constitutional errors in capital cases. He was unable to treat such errors as "isolated incident[s] having no prejudicial effect."²⁸⁶ Blackmun's obvious concern was that prosecutors would adopt practices that would "insulate" matters such as jury selection from "meaningful appellate review."²⁸⁷ Justice Blackmun reiterated his views on harmless error review in *Dawson v. Delaware*.²⁸⁸ There, he concurred in Chief Justice Rehnquist's opinion for the Court vacating the death sentence, but wrote separately to suggest that harmless error review would not be

278. *Id.* at 49-51.

279. *Id.* at 49 (finding Williams' failure to raise claims in his first habeas petition "inexcusable").

280. *Id.* at 52.

281. *Id.* at 66 (Blackmun, J., dissenting).

282. 465 U.S. 37 (1984). In *Pulley*, Justice Blackmun voted to uphold the death penalty. Thus, his objection in *Williams* seems genuinely based on the need for a careful, deliberate process, not the result of a pre-determination of the merits of the case.

283. *Maggio v. Williams*, 464 U.S. 46, 65 (1983) (Blackmun, J. dissenting). Blackmun objected, on similar grounds, to the Court's denial of a stay of execution in *Coleman v. Thompson*, 504 U.S. 188 (1992) (per curiam) (involving a claim of actual innocence). In *Coleman*, Justice Blackmun would have granted the application for a stay pending the Court's decision in *Herrera v. Collins*, for which certiorari had already been granted. *Coleman*, 504 U.S. at 189 (Blackmun, J., dissenting). Instead, he said the Court "denied all possibility of relief" to Coleman "simply because his petition reached this Court later than did Leonel Herrera's." *Id.* at 190.

284. 481 U.S. 648, 660 (1987) (involving the exclusion of a juror).

285. 486 U.S. 249, 267 (1988) (Blackmun, J., concurring in part and in judgment) (involving psychiatric evidence of future dangerousness). See *supra* notes 255-56 and accompanying text.

286. *Gray*, 481 U.S. at 667-68 (noting that the State could instead have used a peremptory challenge to exclude this juror).

287. *Id.* at 665.

288. 503 U.S. 159, 160 (1992) (holding that evidence of defendant's racist beliefs was irrelevant to sentencing and should not have been admitted).

appropriate on remand.²⁸⁹ Justice Blackmun's brief opinion reinforces the impression that, to him, no error in a capital case could properly be regarded as "harmless."

Justice Blackmun's preoccupation with the Court's inhospitability to federal habeas corpus petitions began to take shape in *Dugger v. Adams*.²⁹⁰ In *Dugger*, the Court found petitioner's second habeas petition procedurally barred. Despite the fact that the Court had held, after petitioner's state court appeal, that a prosecutor's remarks misinforming the jury about its role in sentencing violated the Eighth Amendment,²⁹¹ the majority objected to petitioner's failure to challenge the trial judge's instructions on pre-existing state law grounds.²⁹² Justice Blackmun termed this action an "arbitrar[y] impo[sition of] procedural obstacles to thwart the vindication of . . . a[n] Eighth Amendment claim."²⁹³ Blackmun's outrage at this tactic could hardly be more clear:

[T]his Court is sending a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what is felt to be the appropriate time for doing so [T]he majority not only capriciously casts aside precedent to reinstate an unconstitutionally "unreliable" death sentence purely for procedural reasons, but also compounds that capriciousness by issuing an opinion in which decisive issues receive only dismissive consideration. Given this treatment of the case, it is worth reflecting for a moment on the special inappropriateness and cruelty of the impending execution.²⁹⁴

Justice Blackmun thought Adams had shown cause (in the form of a novel rule) to justify his earlier failure to raise the claim at issue.²⁹⁵ But even were that not so, Justice Blackmun would have reached his claim on "fundamental miscarriage of justice" grounds.²⁹⁶ He described the error in this case—instructions that misstated the jury's role in sentencing—as "global in scope," "pervad[ing] the entire sentencing process," and "pervert[ing] the sentencing decision."²⁹⁷ If such errors did not fall within the fundamental miscarriage of justice exception to the cause and prejudice test for federal habeas review, Blackmun seemed to wonder what would.

289. *Id.* at 169 (Blackmun, J., concurring). The Court left open the question whether the error had been harmless. *Id.*

290. 489 U.S. 401 (1989).

291. *Id.* at 403-06 (discussing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

292. *Id.* at 407-10.

293. *Id.* at 412-13 (Blackmun, J., dissenting).

294. *Id.* at 413-14.

295. *Id.* at 416-21.

296. *Id.* at 422.

297. *Id.* at 423.

Justice Blackmun considered at length the availability of federal review in *Sawyer v. Whitley*²⁹⁸ and *Herrera v. Collins*.²⁹⁹ In *Sawyer*, Blackmun concurred in the judgment affirming the procedural bar of petitioner's habeas claim of actual innocence,³⁰⁰ but disagreed with the Court's "implicit premise" that "the only 'fundamental miscarriage of justice' in a capital proceeding that warrants redress is one where petitioner can make out a claim of 'actual innocence.'"³⁰¹ To the contrary, a miscarriage of justice occurs "whenever a conviction or sentence is secured in violation of a federal constitutional right."³⁰² Thus, while the Court circumscribed the ambit of review,³⁰³ ignoring procedural defaults only in cases demonstrating probable actual innocence, Justice Blackmun understood the role of the federal courts to be much broader in protecting defendants from violation of any of their constitutional rights. *Sawyer* forced Justice Blackmun to reexamine his own premises as well as the Court's. He noted that his ability

to enforce, notwithstanding [his] own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards, chief among them the Federal Judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed.³⁰⁴

Clearly troubled by the executions of "two victims of the 'new habeas,'" Blackmun concluded that the "more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more [it] undermines the very legitimacy of capital punishment itself."³⁰⁵

Actual innocence cases were among the most difficult for Justice Blackmun.³⁰⁶ *Herrera v. Collins*³⁰⁷ was such a case. Herrera wished to present newly discovered evidence of actual innocence in a habeas proceeding ten years after his conviction. Texas required a new trial motion based on newly

298. 505 U.S. 333 (1992).

299. 506 U.S. 390 (1993).

300. *Sawyer*, 505 U.S. at 350 (Blackmun, J., concurring).

301. *Id.* at 351. Justice Blackmun rejected the Court's requirement that the petitioner show that "but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty." *Id.* at 336.

302. *Id.* at 352 (objecting to the Court's "unduly cramped view of actual innocence").

303. *See id.* at 352-55 (reviewing decisions narrowing scope of review).

304. *Id.* at 358 (wondering what remains of that premise).

305. *Id.* at 358, 360 (referring to Warren McCleskey and Roger Keith Coleman, both executed that Term).

306. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991).

307. 506 U.S. 390 (1993).

discovered evidence to be made within thirty days of sentencing. The Court reaffirmed the rule that federal habeas relief is available for claims of actual innocence based on newly discovered evidence only when accompanied by an independent constitutional error in the trial, such as the prosecution's withholding of exculpatory evidence.³⁰⁸ Contrary to the presumption of innocence to which defendant is initially entitled, after ten years of state and federal proceedings the paramount interest was preventing the "very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States."³⁰⁹

Dissenting in *Herrera*, Justice Blackmun returned to the long-asserted proposition that the ban on "cruel and unusual punishments" "reflects evolving standards of decency."³¹⁰ Executing an innocent person, to Blackmun, "is contrary to any standard of decency"³¹¹ imaginable and plainly violates the Eighth Amendment.³¹² In fact, such an execution "comes perilously close to simple murder."³¹³ Justice Blackmun was particularly angered that the Court, having turned "review of successive, abusive or defaulted claims away from the preservation of constitutional rights to a fact-based inquiry into the habeas petitioner's guilt or innocence," now held that "a prisoner who is actually innocent must show a constitutional violation to obtain relief."³¹⁴ He would have held that "to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent."³¹⁵ In the absence of "any restriction on the States' power to execute whomever and however they please," Justice Blackmun doubted whether "capital punishment remains constitutional at all."³¹⁶

Finally, in *Callins v. Collins*³¹⁷ Justice Blackmun reiterated the federal courts' obligation under 28 U.S.C. § 2254(a) to "entertain petitions from state prisoners who allege that they are held 'in violation of the Constitution . . . of the United States.'"³¹⁸ He reviewed once again the Court's erection of "unprecedented and unwarranted barriers" to federal habeas review.³¹⁹ Because

308. *Id.* at 397-98.

309. *Id.* at 417.

310. *Id.* at 431 (Blackmun, J., dissenting).

311. *Id.* at 435.

312. *Id.* at 431.

313. *Id.* at 446.

314. *Id.* at 438-39.

315. *Id.* at 442. Justice Blackmun found the new evidence in this case "sufficient to raise factual questions concerning petitioner's innocence" that should be tested in a habeas proceeding. *Id.* at 445.

316. *Id.* at 446.

317. 510 U.S. 1141 (1994).

318. *Id.* at 1157.

319. *Id.* at 1158 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 351 (1992) (Blackmun, J. concurring in judgment)).

he was no longer sure that “the federal judiciary [would] provide meaningful oversight to the state courts as they exercise[d] their authority to inflict the penalty of death,”³²⁰ Justice Blackmun concluded that the death penalty was unconstitutional.³²¹

This close examination of Justice Blackmun’s death penalty opinions reveals a long struggle to reconcile individualized sentencing with the need for consistency. It illustrates, as well, Blackmun’s determination to apply the law faithfully. In *Furman*, he insisted the Court should have adhered to its decision in *McGautha*.³²² He dissented in *Woodson* and *Stanislaus Roberts* because he believed their holdings departed from *Furman*’s mandate of consistency. When, in *Harry Roberts*, Justice Blackmun refused to follow two recent decisions, he did so not only because he thought them wrongly decided under *Furman* but also because he considered them weak precedents.³²³ *Gregg* established a framework calling for attention to the circumstances of the crime and the character of the defendant and stressed the importance of fair procedural rules and meaningful appellate review.³²⁴ *Lockett* explicitly invited Justice Blackmun to follow a tendency his Eighth Circuit opinions had already displayed: to focus on all the facts of each defendant’s case.³²⁵ Even so, Justice Blackmun was more cautious than the Court in applying *Lockett* until its full impact became clear in *Eddings*.³²⁶ Thereafter, Justice Blackmun focused so closely on the facts of each case that it may have seemed to him no prior case squarely controlled.³²⁷ The two other themes of Blackmun’s death penalty jurisprudence—ensuring that trial and sentencing procedures were fair and providing meaningful (perhaps exhaustive) federal review—only reinforced this pattern of case-by-case determination.³²⁸

320. *Id.* at 1158-59.

321. *Id.* at 1159.

322. *Furman v. Georgia*, 408 U.S. 238, 408-09 (1972).

323. *Stanislaus Roberts* was decided only by a plurality, and *Washington v. Louisiana* was decided without full briefing and argument. See *supra* note 145 and accompanying text.

324. See *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (discussing the particulars of the crime and of the defendant); *id.* at 192 (discussing fair procedural rules); *id.* at 206 (discussing appellate review).

325. *Lockett v. Ohio*, 438 U.S. 586, 616 (1978) (Blackmun, J., concurring in part and in judgment).

326. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

327. Cf. Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 DICK. L. REV. 541, 555-59 (1993) (discussing Justice Blackmun’s close attention to facts in constitutional cases).

328. Cf. Blais, *supra* note 5, at 524-26 (suggesting that Justice Blackmun’s incremental approach required “robust” federal habeas jurisdiction and that once the Court abandoned habeas review of death penalty cases, Blackmun’s “modest,” deferential stance was no longer possible).

Before commenting further on Justice Blackmun's death penalty odyssey, I return in Part IV to the Kafka short story, *In the Penal Colony*, and the struggle of the explorer.

IV. JUSTICE BLACKMUN AS THE EXPLORER

Literary criticism and interpretation of *In the Penal Colony* abound.³²⁹ This "uniquely horrible tale"³³⁰ "lends itself to many interpretations,"³³¹ among them theological, psychoanalytic, and metaphysical approaches.³³² According to one critic, "ambiguity is . . . the keynote of Franz Kafka."³³³ Interpreting Kafka is a "dangerous business,"³³⁴ Kafka remains "an elusive, teasing, secretive author."³³⁵ How, then, can reading Kafka help us understand Justice Blackmun?

A. A New Reading of the Story

In the Penal Colony is—at least superficially—"about" capital punishment, though no critic interprets it as a commentary on that practice.³³⁶ Nor do I

329. See generally, LIDA KIRCHBERGER, *FRANZ KAFKA'S USE OF LAW IN FICTION* 13-42 (1986); PASCAL, *supra* note 28, at 60-89; ALLEN THIER, *FRANZ KAFKA: A STUDY OF THE SHORT FICTION* 51-67, 136-46 (1990); 53 *TWENTIETH-CENTURY LITERARY CRITICISM* 202-36 (1994) [hereinafter 53 *LITERARY CRITICISM*]; Austin, *supra* note 46, at 363-65; Mark Sacharoff, *Pathological, Comic, and Tragic Elements in Kafka's "In the Penal Colony,"* in *GENRE IV* No. 4, at 392-411 (1971); Erwin R. Steinberg, *The Judgment in Kafka's "In the Penal Colony,"* 5 *J. MOD. LIT.* 492, 492-514 (1976); J.D. Thomas, *The Dark at the End of the Tunnel: Kafka's "In the Penal Colony,"* *IV STUDIES IN SHORT FICTION* 12, 18 (1966).

330. Sacharoff, *supra* note 329, at 392.

331. Steinberg, *supra* note 329, at 492; see also PASCAL, *supra* note 28, at 18 (describing the "pandemonium of critical interpretations" of the story).

332. Sacharoff, *supra* note 329, at 392.

333. Thomas, *supra* note 329, at 13. Another critic notes that this "story offers, by its method, the sense of a fact which you can interpret as you like." Austin, *supra* note 46, at 365.

334. PASCAL, *supra* note 28, at 18 (noting that Kafka's texts "offer obscurities" and that his "narrative method [is] very subtle, intricate, . . . puzzling . . . [and] diverse").

335. PASCAL, *supra* note 28, at 12.

336. One writer comments that the story is "ostensibly about a legal institution—that of punishment." Christine Bell, *Teaching Law As Kafkaesque*, in *TALL STORIES? READING LAW AND LITERATURE* 13, 13 (John Morison & Christine Bell eds., 1996). Bell also describes Judge Posner's attack on this interpretation. *Id.* at 14-15 (citing POSNER, *supra* note 27, at 117-18). See also KIRCHBERGER, *supra* note 329 (examining legal implications of the story); Doreen F. Fowler, *"In the Penal Colony": Kafka's Unorthodox Theology*, in THIER, *supra* note 329, at 137-38 (positing Biblical parallels). See generally Steinberg, *supra* note 329 (discussing various religion-based interpretations and suggesting that the story represents Kafka's struggle with Judaism). Others relate

maintain that Kafka had such a purpose in mind.³³⁷ All seem to agree that the basic theme of the story is struggle.³³⁸ Most literary critics have interpreted the story as depicting the conflict between old and new religious orders or between archaic and modern legal systems or notions of justice. But one quality often ascribed to literature is a timelessness that lends itself to new interpretations long after the piece was written.³³⁹ Thus, I propose a reading, obviously not foreseen by Kafka, that connects his story with modern capital punishment jurisprudence.

I suggested in Part II that *In the Penal Colony* can be situated, for purposes of interpretation, around the time of the *Furman* decision in 1972, and I drew parallels between Justice Blackmun and the character of the explorer.³⁴⁰ My reading of the story posits that the colony represents contemporary American society, a place where executions have largely faded from public view.³⁴¹ The old Commandant represents the pre-*Furman* state of the law, which allowed capital punishment with relatively little interference. The officer in the story—the chief proponent of the execution practice—stands for states that continue to practice capital punishment. In the early 1970s, these states stood in opposition to the new Commandant—the federal courts, especially the Supreme Court, which first rejected capital punishment and later allowed it only with significant restrictions.³⁴² The execution machine represents modern death penalty jurisprudence, which, like the machine itself, is overly complicated, labyrinth-like, and inherently unworkable.³⁴³

Here my interpretation forces me to depart from the time-line of the story. The explorer was called upon to render an opinion only once, while Justice

the story to great contemporary controversies such as the impending World War I, see PASCAL, *supra* note 28, at 87-89, or the rise of authoritarian regimes like Nazism, see Paul J. Dolan, *Kafka: The Political Machine*, in 53 LITERARY CRITICISM, *supra* note 329, at 213, 213.

337. The story plainly centers on the process of making judgments about human conduct.

338. See KIRCHBERGER, *supra* note 329, at 13.

339. Cf. NUSSBAUM, *supra* note 27, at 7-8 (noting that “the novel does not restrict its address to readers of a single place and time”); POSNER, *supra* note 27, at 75 (stating that to survive over time, literature “must deal with the perennial concerns of humankind”).

340. See *supra* notes 26-54 and accompanying text.

341. See Kafka, *supra* note 26, at 225-26 (describing the lack of popular support for and attendance at executions); *Furman v. Georgia*, 408 U.S. 238, 340 (1972) (Marshall, J., concurring) (calling executions “infrequent, private affairs”).

342. See Kafka, *supra* note 26, at 220-21 (describing new Commandant’s “inclination to interfere” with the officer’s judgments).

343. See, e.g., *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); see also Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 371 (1995) (describing death penalty doctrine as “complex, arcane, and minutely detailed”).

Blackmun faced the question over one hundred times. The story is frozen in the "delicately poised moment"³⁴⁴ between the death of the officer—the end of capital punishment in *Furman*—and the prophesied return of the old ways. It is at that point that the fictional explorer flees the colony, presumably to spare himself the need to resolve, once and for all, his ambivalent feelings about the execution machine when the old Commandant returns. Justice Blackmun departed much later, long after *Gregg* opened the way for the states to reinstate the death penalty. Justice Blackmun's struggle to resolve questions of the legitimacy of capital punishment played out not in a moment, but over the next two decades following *Furman*.

B. The Problem of Judging

The concept of struggle is fundamental to judging. To judge forces one to make a decision, usually a difficult one, between two opposing interests or positions. Likewise in literature, meaning is derived through resolution of the central tension of the work, in a process James Boyd White calls "contraries comprehended."³⁴⁵ *In the Penal Colony* has much to say about the difficulties of judging.

If the central theme of Kafka's story is struggle, its ending is unsatisfying because the struggle is never resolved. The explorer flees, still torn between horror over the execution practice and respect for its proponent, the now-deceased officer.³⁴⁶ Similarly, Justice Blackmun was torn between deference to the states' legislative will to impose the death penalty and his own moral repugnance toward the practice. His opinions reveal ambivalence and ambiguity. First, some opinions, most notably *Furman*, vividly depict Justice Blackmun's deference/moral repugnance dilemma. Second, in a number of cases, Justice Blackmun's statements abhorring the death penalty flatly contradict his votes to uphold it. Third, even when he rejected capital punishment in *Callins*, he did so not categorically but with the thought that others might eventually find a way to impose the penalty in accordance with the dictates of the Constitution. The ambivalence and ambiguity of Justice Blackmun's opinions mirror the unsatisfying end of the story.

344. Leonard R. Mendelsohn, *Kafka's "In the Penal Colony" and the Paradox of Enforced Freedom*, in 53 LITERARY CRITICISM, *supra* note 329, at 210, 212 (describing the moment "when the ritual is dying, but when its mechanical performance has not ceased").

345. JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 114-17 (1985) (noting that "in both poetry and law . . . the conjunction of two contraries is seen to give both a new meaning").

346. See Sacharoff, *supra* note 329, at 408 (describing explorer's admiration of officer's intense convictions).

The question, for Kafka's explorer and Justice Blackmun alike, is what they made of the opportunity handed them: to judge.³⁴⁷ In other words, do their ambivalence and ambiguity compel a conclusion that they failed in this task? Two answers come to mind with respect to the story. On one hand, the "bitter lesson of the ending is that a conclusion is not available, only an evasion that merely perpetuates the doubts and problems that the incidents of the story give rise to."³⁴⁸ On the other hand, "if the ending is morally inconclusive, if it does not round off the story and resolve the problems it has set, it shows us something equally important, since its inconclusiveness tells us that these are problems that are not settled but still have to be wrestled with."³⁴⁹ That is, the explorer may have failed, but the decision he faced was an impossible one. Like the explorer's neutrality, Justice Blackmun's ambiguous jurisprudence may "now express [] the troubled state of mind of someone who has had a glimpse into hitherto undiscerned depths."³⁵⁰

In the story, three critical moments call the explorer's role as judge into sharp relief. First, there is a moment, early in the story, when the explorer hesitates to judge at all. Later on, in the moment of decision, he offers a qualified judgment based on a personal, emotional reaction. Finally, he flees before the issue can arise again. These critical moments correspond roughly to Justice Blackmun's early, grudging deference to the legislature, to his qualified rejection of capital punishment and his unusually personal and emotional opinions, and to his decision to announce his change of heart just before retiring from the Court. Critics have judged harshly the actions of the explorer in each of these moments. This Article attempts to assess Justice Blackmun's performance.

1. Hesitation

In the Penal Colony opens with the officer simultaneously readying his "remarkable apparatus" for use and explaining its workings to the explorer.³⁵¹ During this time, the explorer's reactions move from indifference to interest and even to admiration for the officer's enthusiasm.³⁵² As the details of the horrible procedure become clear, "many questions . . . troubl[e] the explorer,"³⁵³ chief among them the procedures by which the condemned prisoner had been tried and

347. Cf. PASCAL, *supra* note 28, at 66 (noting that the story ends, properly, not with the death of the officer, but with the concluding response of the explorer).

348. PASCAL, *supra* note 28, at 78.

349. PASCAL, *supra* note 28, at 89.

350. Martin Greenberg, *The Terror Of Art: Kafka and Modern Literature*, in 53 LITERARY CRITICISM, *supra* note 329, at 203, 205.

351. Kafka, *supra* note 26, at 217-20.

352. Kafka, *supra* note 26, at 218-19.

353. Kafka, *supra* note 26, at 220.

sentenced. The officer's answers about the judicial procedure displease the explorer.³⁵⁴ With the explanation of the machine finally complete and the execution about to begin, the explorer hesitates. He finds himself "strongly tempted" to intervene, but notes that he

was neither a member of the penal colony nor a citizen of the state to which it belonged. Were he to denounce this execution or actually try to stop it, they could say to him: "You are a stranger, mind your own business." He could make no answer to that³⁵⁵

This thought paralyzes the explorer. At the same time, the explorer recalls that the Commandant invited him to attend the execution and report his views.³⁵⁶ Thus, he is not entirely free of any obligation to decide. The moment for decision arrives when the officer begs the explorer to help him carry out his plan to preserve the ritual.³⁵⁷ Again, the explorer "hesitate[s] for as long as it [takes] to draw one breath."³⁵⁸

This moment embodies a whole range of questions about judging: When is judicial intervention appropriate?³⁵⁹ How far can judicial intervention legitimately extend? Which decisions are properly left to others to decide? Judges confront such questions every day in the form of ripeness, justiciability, the political question doctrine, and related issues.³⁶⁰ For Justice Blackmun, the issue in death penalty cases was deference to the legislative (and popular) will. A passage in his *Furman* opinion is eerily similar to the explorer's rumination:

Having lived for many years in a State that does not have the death penalty, . . . capital punishment ha[s] never been a part of life for me. Were I a legislator, I would vote against the death penalty I do

354. Kafka, *supra* note 26, at 221. Part III.D.2 of this Article, *supra*, explores Justice Blackmun's dissatisfaction with trial and sentencing procedures from 1978 onward.

355. Kafka, *supra* note 26, at 224.

356. Kafka, *supra* note 26, at 225. Pascal notes that the explorer "admits . . . the commandant had sent him to view the execution apparently with the object of receiving his opinion on it." PASCAL, *supra* note 28, at 85. This admission contrasts with the explorer's denials elsewhere of any authority to judge the colony's legal procedures. PASCAL, *supra* note 28, at 84.

357. Kafka, *supra* note 26, at 229.

358. Kafka, *supra* note 26, at 229.

359. The explorer tells the officer that he "wonder[ed] whether it would be [his] duty to intervene and whether [his] intervention would have the slightest chance of success." Kafka, *supra* note 26, at 230.

360. Cf. Blais, *supra* note 5, at 519 (suggesting that ripeness, justiciability, and political question doctrines "embody a modest appraisal of the judiciary's role in our constitutional structure").

not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here . . . is to pass upon the constitutionality of legislation This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.³⁶¹

Like the explorer, Justice Blackmun reacted with horror and revulsion at the prospect of the execution, but declined to stop it—voting in *Furman* and *Gregg* to allow it to go forward. In both instances, the hesitation to intervene stems from perceived limitations in the authority of the judge.

Literary critics, analyzing the story from a variety of perspectives, find the explorer's hesitation profoundly troubling.³⁶² To the task of judging, the explorer brings several important qualities. He is "[e]clectic and tolerant of national modes," and his "far-reaching sympathies . . . allow him to give more than a limited conventional response to an inhumane procedure."³⁶³ But he "[r]etreat[s] behind protocol" to "stifle[] his revulsion at what he might consider barbarism. . . ."³⁶⁴ He clings to the "illusion" of detachment and dreads being

361. *Furman v. Georgia*, 428 U.S. at 238, 406, 410-11 (1972) (Blackmun, J., dissenting).

362. As a preliminary matter, critics disagree about the nature of the explorer's role. As Pascal explains, some translations, including the one used here, name this character the "explorer," while others call him the "traveler." PASCAL, *supra* note 28, at 83. Pascal believes the appellation "explorer" represents a "serious misunderstanding," for:

An explorer is a man with a precise purpose, determined to reach some goal, and usually equipped with the technique and expertise required to make his discoveries. A traveler is much more indeterminate, perhaps a sightseer on the lookout of anything curious, perhaps a philosophical observer. . . . No, [this character] is a traveler, a visitor, a passer-by, who observes with some sympathy, some distaste, who carries with him his own civilized, enlightened, tolerant persuasions, but does not get involved; one might almost say, who maintains his civilized tolerance by virtue of not getting involved.

PASCAL, *supra* note 28, at 83-84. I think the story demands more of the explorer than mere observation. He is there at the invitation of the new Commandant, Kafka, *supra* note 26, at 217, 225, and clearly is expected to make a report. Kafka, *supra* note 26, at 227 (discussing the explorer's anticipated "verdict" against him). But even if the character's role is reduced to that of a "traveler," his hesitation to act forms the heart of the story. Justice Blackmun's obligation to decide is obvious.

363. Dale Kramer, *The Aesthetics of Theme: Kafka's "In the Penal Colony,"* in 53 LITERARY CRITICISM, *supra* note 329, at 205, 206 (describing appropriate deference, detachment, compassion, and open mindedness). See also *Rochin v. California*, 342 U.S. 165, 171-72 (1952) (describing judges' need for detachment, objectivity, and tolerance); Koh, *supra* note 69, at 95 (discussing the role of tolerance in Justice Blackmun's alienage opinions).

364. Mendelsohn, *supra* note 344, at 210.

pushed into the role of arbiter.³⁶⁵ Ultimately, the explorer "cannot escape the freedom" to judge the colony's execution practice.³⁶⁶ He "must either reject the ritual or sustain it."³⁶⁷ Thinking he can get away with doing neither is the explorer's problem.³⁶⁸ Though readers are drawn to the explorer's humanity, they are "unable whole-heartedly to endorse [his] humane values" because of the "equivocal role he plays."³⁶⁹ The story demonstrates not "that the [explorer]'s humane principles are wrong; it demonstrates that they are only principles, since in the test of this experience he fails to act upon them."³⁷⁰

Similarly, Justice Blackmun's former clerks describe him as a "modest,"³⁷¹ "humble and self-effacing"³⁷² man who brought tolerance,³⁷³ a "sensitive judicial attitude,"³⁷⁴ and a "warm and human face"³⁷⁵ to his decisions. If a "compassionate judge" is one "who takes into account the potential effects of a decision in terms of human hardship and suffering,"³⁷⁶ Justice Blackmun surely fits the description.³⁷⁷ His sympathy extended to the "unfortunate denizens" of the world, the "poor, the powerless, and the oppressed."³⁷⁸ But, like the explorer, Justice Blackmun may have failed to act upon his humane values. Though he hardly stifled his revulsion at capital punishment, Justice Blackmun employed techniques of judicial "modesty" to "defer decision in the hope of avoiding it."³⁷⁹ The question is whether Justice Blackmun's hesitation is as troubling as that of the explorer.

Justice Blackmun's hesitation in *Furman* grew out of a concept of judging that required deference to the legislature, allowing judges to rule only on the constitutionality, and not the advisability or morality of statutes. This attitude of deference is thoroughly ingrained in our system of government by the separation of powers doctrine, which judges are compelled to respect.³⁸⁰ But the

365. Mendelsohn, *supra* note 344, at 210.

366. Mendelsohn, *supra* note 344, at 212 (describing the explorer as a "fugitive from decision").

367. Mendelsohn, *supra* note 344, at 212.

368. Dolan, *supra* note 336, at 215.

369. PASCAL, *supra* note 28, at 83.

370. PASCAL, *supra* note 28, at 84.

371. Blais, *supra* note 5, at 518 (describing personal and jurisprudential modesty).

372. Koh, *supra* note 69, at 51.

373. Karlan, *supra* note 4, at 184.

374. Koh, *supra* note 69, at 53.

375. Koh, *supra* note 69, at 103.

376. Mary M. Schroeder, *Compassion on Appeal*, 22 ARIZ. ST. L. J. 45, 46 (1990).

377. See, e.g., Karlan, *supra* note 4, at 182-83 (describing Blackmun's awareness of the "condition of outsiders"); Koh, *supra* note 69, at 56 (describing Blackmun's concern with "real-life impact" of decisions on human lives).

378. Karlan, *supra* note 4, at 173.

379. Cf. Blais, *supra* note 5, at 519 (describing actions of the Supreme Court).

380. For application of the separation of powers doctrine in death penalty

deference Justice Blackmun offered with one hand he appeared to take back with the other by stating his personal views, thereby introducing a great deal of equivocation into the process of judging. Like the explorer, he tried both to defer to the popular will and to condemn the practice it chose. He disparaged capital punishment in the strongest terms, but voted to allow it. To be fair, Justice Blackmun's vote to uphold the penalty in *Furman* stemmed, at least in part, from the fact that a majority of the Court had voted only one year earlier to do exactly that in *McGautha*.³⁸¹ Thus, he was not only deferring to the legislature but was also (as judges must) trying to apply the law as it stood. Even granting that contemporary values play a role in these determinations, he saw no evidence of a sea-change in public opinion in just one year. Following this analysis, Justice Blackmun's vote may well have been proper. It is his statement of personal beliefs that calls his judgment into question.³⁸²

Justice Blackmun's problem, I suggest, is that while he observed two important limitations on the role of a judge (deference to the legislature and fidelity to pre-existing law), he transgressed a third important precept. His hesitation in *Furman* seems to stem from paralysis, an intolerable quality in judges. While it may be unclear to what extent the explorer was obligated to decide, Justice Blackmun's duty was plain. He cannot have it both ways—he must decide.³⁸³ Like the explorer, Justice Blackmun hesitated to act upon the principles he held dear. What a critic said of the explorer's response to the penal colony applies equally to Justice Blackmun's opinion in *Furman*: both are “so ambivalent that it becomes effectively impossible to do the very thing that is central here . . . : pronounce judgment.”³⁸⁴ Justice Blackmun's vote in *Furman*, standing apart from his opinion, would have been an unequivocally deferential resolution of the case. Taken together with his opinion, his dissenting vote amounts to a mere gesture toward deference and stare decisis.

adjudication, see *Furman v. Georgia*, 408 U.S. 238, 417, 432 (1972) (Powell, J., dissenting).

381. *McGautha v. California*, 402 U.S. 183 (1971).

382. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 208 (1975) (noting that judges' participation in a “divergent course” is “often accompanied by protests that responsibility lay elsewhere, by indications of stress, helplessness, and, indirectly, guilt”).

383. Judge Aldisert wrote of the decisiveness required of judges: “[H]ard decisions are not made easier by postponement. The judge must have intellectual courage and confidence to meet the responsibilities of office without procrastination.” Ruggero J. Aldisert, *What Makes A Good Appellate Judge? Four Views*, 22 *JUDGES J.* 14, 16 (1983).

384. Arnold Weinstein, *Kafka's Writing Machine: Metamorphosis in the Penal Colony*, in 53 *LITERARY CRITICISM*, *supra* note 329, at 219, 219.

2. Decision

Finally, the moment of decision arrives. The explorer decides not to endorse the execution procedure. He vows to tell the new Commandant his views, "not at a public conference, only in private."³⁸⁵ But this decision fails to dispel the equivocation inherent in the moment of hesitation. Private announcement mutes the impact of the decision. And in any event, the explorer's decision misses the real issue. One critic wrote of the explorer:

Ironically, he issues his decision on the basis of moral squeamishness, and in so doing he decides upon the irrelevant. The humane properties of the machine are not the issue, which is, quite simply, whether the ritual should continue Asked about the essential, the machine and its function, he rules on the accident, the machine and its method. Rendering judgment on the accident, he nonetheless dooms the essence, at the same time failing to provide any substitute.³⁸⁶

Another suggests that it is "emotion, leading on to conviction" that pushes the explorer into the dreaded role of arbiter.³⁸⁷ Even now, the explorer "frantically strives to avoid pronouncing [the ritual's] final doom. He shuns the moment of decision with greater fervor than he promotes his conviction concerning the morality of the machine."³⁸⁸

For Justice Blackmun, the moment of decision presented itself countless times. In some respects, his death penalty decisions suffer from the same defects as the explorer's decision: muted impact and failure to reach the essential issue. But the nature of and limitations upon Justice Blackmun's obligation to decide call for an assessment less harsh than Mendelsohn's criticism of the explorer.³⁸⁹

385. Weinstein, *supra* note 384, at 219.

386. Mendelsohn, *supra* note 344, at 212.

387. Mendelsohn, *supra* note 344, at 210.

388. Mendelsohn, *supra* note 344, at 210. See also Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 206-07 (1990) (stating that "[t]he one thing a judge never admits in the moment of decision is freedom of choice").

389. See generally Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 207 (1987) (stating that the "difference between literary interpretation and adjudication . . . is the . . . power wielded by the judiciary" and cautioning that adjudication "is an imperative act").

a. Muting the Impact

Justice Blackmun muted the impact of his decisions in several ways. In cases like *Furman v. Georgia*³⁹⁰ and *Sawyer v. Whitley*,³⁹¹ he condemned capital punishment but voted to impose it. In the story, the explorer's "natural, spontaneous instinct to help his fellow creature" is "smothered by complex reflections about what was right or logical or prudent or correct."³⁹² But here the role of the judge diverges from the explorer's obligation to decide. Judges are expected to engage in precisely this sort of "complex reflection." In our system, the decision in each case grows out of a body of precedent and becomes part of the law that will decide future cases. Justice Blackmun was properly concerned with maintaining fidelity to the law announced in previous cases and with establishing a position he could apply in the death penalty cases he knew would continue to come to the Court.³⁹³ But he could not achieve these objectives by speaking one way and voting the other.

James Boyd White describes two aspects of criticism of judicial opinions: one focuses on the result; the other on the opinion "as a piece of law-making."³⁹⁴ The latter aspect gets at the heart of judges' "performance as judges,"³⁹⁵ considering matters such as their neutrality, professionalism, and knowledge. For White,

the most important 'result' in an opinion is not the judgment it reaches on a particular issue but the character the court gives itself in its writing and the opportunities for thought and community that it creates. The truest meaning of an opinion is not its message, but the experience of mind it holds out as a model of legal thought: the language it makes as it places one item next to another, the community it makes with its several audiences.³⁹⁶

White defines excellence in opinions in terms of their composition, including "what the case is made to mean" and "what possibilities for argument and life the opinion holds out to the future."³⁹⁷ Measuring Justice Blackmun's death penalty opinions against these standards finds them wanting.³⁹⁸ As law-making

390. 408 U.S. 238 (1972) (per curiam).

391. 505 U.S. 333 (1992).

392. PASCAL, *supra* note 28, at 86.

393. Cf. COVER, *supra* note 382, at 201-02 (describing the evolution of the doctrine in cases presenting a moral-legal disparity, such as antislavery cases).

394. WHITE, *supra* note 345, at 117-18.

395. WHITE, *supra* note 345, at 118.

396. WHITE, *supra* note 345, at 118.

397. WHITE, *supra* note 345, at 118.

398. I do not, of course, suggest that Professor White would share my criticisms of Justice Blackmun's opinions. In fact, some of the criteria White discusses might lead

compositions, Justice Blackmun's capital punishment opinions lack clarity and decisiveness.³⁹⁹ These opinions also express a "character" or a "model of legal thought" that, to my mind, ultimately invites cynicism toward a Justice who imposes the very result he criticizes. In the end, while one may respect Blackmun's candor or applaud his desire not to trample on the legislature's prerogative, one must concede that his vote blunts the force of his rhetoric, and the rhetoric undermines his vote. To use White's terms, the "contrarities" of Blackmun's language and actions are not "comprehended"—resolved—in his opinions. Justice Blackmun fails in the essential task of judging: to exercise and justify the power of deciding.⁴⁰⁰

In addition, the use of highly personal, emotional language departs from accepted norms and tends to deprive Justice Blackmun's decisions of their expected force.⁴⁰¹ The Justice himself described what he wrote in *Furman* not as an opinion but as "personal comments."⁴⁰² He wrote often in the first person⁴⁰³—rare enough in judicial opinions—and, rarer still, used language that can only be described as wrought with emotion.⁴⁰⁴ Judges sometimes acknowledge that the decision before them is a difficult one,⁴⁰⁵ but never before

him to applaud, as many do, Justice Blackmun's compassionate approach. WHITE, *supra* note 345, at 118 (discussing the "degree to which the court recognizes the legitimacy and humanity of the litigant . . . and fairly judges the legitimacy of his or her point of view"); see also WHITE, *supra* note 345, at 123 (arguing that the "judge is always a person deciding a case," not merely a voiceless, faceless actor).

399. This criticism is a bit unfair to the extent I apply it to dissenting opinions, which do not purport to make law.

400. WHITE, *supra* note 345, at 123 (stating that a judge's true task is to exercise and to justify true power of decision).

401. See, e.g., POSNER, *supra* note 27, at 1434, 1436 (suggesting that the "shocking convergen[ce]" of the actual and implied author of Justice Blackmun's opinions "raised the question of authenticity" by abandoning classical rhetorical "devices by which the speaker tries to convince his audience that he is a person worthy of belief"); Rosen, *supra* note 4, at 17 (stating that Blackmun's "grandiose rhetoric often struck a false and unnatural note").

402. *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting). See also *Maxwell v. Bishop*, 398 F.2d 138, 153-54 (8th Cir.), cert. granted, 393 U.S. 997 (1968), vacated, 398 U.S. 262 (1970).

403. See, e.g., *Furman*, 408 U.S. at 405-14 (Blackmun, J., dissenting); see also *Callins v. Collins*, 510 U.S. 1141, 1143-1159 (1994) (Blackmun, J., dissenting from denial of certiorari); *Herrera v. Collins*, 506 U.S. 390, 430-46 (1993) (Blackmun, J., dissenting); *Sawyer v. Whitley*, 505 U.S. 333, 350-60 (1992) (Blackmun, J., dissenting). In *Maxwell v. Bishop*, Blackmun's personal comments were phrased in the more detached third person, referring to himself as "the author of this opinion." 398 F.2d at 153-54.

404. This is not to say emotion has no role in sentencing. See, e.g., Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 366-72 (1996) (discussing the need for consideration of emotion in sentencing).

405. See, e.g., *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 273 (1995) (Ginsburg,

have we read that the case presents for the judge an "excruciating agony of the spirit."⁴⁰⁶ We expect that many decisions are difficult—even agonizing—but in order to maintain our confidence in the courts, we expect judges to carry out dispassionately the duties we have entrusted to them. Moreover, it is the judge, not the person, to whom we have entrusted the power to decide.⁴⁰⁷ We do not expect to read in opinions the judge's personal views—in fact, we expect judges, as unbiased arbiters, to set personal beliefs aside.⁴⁰⁸ Justice Blackmun set his personal views aside by voting the opposite way. But that does not lessen our surprise in reading about these views.

We expect judges to acquaint themselves thoroughly with the facts of the case⁴⁰⁹ and to bring compassion and humanity to the task of judging.⁴¹⁰ But we also cling to the fundamental principle that our judges remain detached and objective⁴¹¹—an illusion that may be dashed if the judge seems too personally

J., dissenting) (racial classifications); *O'Connell v. Kirchner*, 513 U.S. 1138, 1138 (1995) (O'Connor, J., dissenting) (adoption); *Lee v. Weisman*, 505 U.S. 577, 584 (1992) (school prayer).

406. *Furman*, 408 U.S. at 405 (Blackmun, J., dissenting). See also *Maxwell v. Bishop*, 398 F.2d at 153-54 (describing the decisional process as "excruciating.")

407. Cf. WHITE, *supra* note 345, at 123 (noting that "the judge is always a *person* deciding a case"). I understand Professor White to mean that each judge is individually responsible for his or her decisions and the opinions justifying those decisions. He contrasts an individually responsible judge with a bureaucratic actor; he does not suggest that the judge acts in a personal capacity.

408. See, e.g., WHITE, *supra* note 345, at 118 (discussing judges' neutrality and "openness to the contraries in a case"); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1198 (1988) (noting that "[t]he rhetoric of judging insists that judges should put aside their personal beliefs when called upon to decide what the law requires").

409. See, e.g., FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 167 (1980). But we do not, perhaps, expect appellate judges to delve as deeply into the facts as Blackmun did, for example, in *Mitchell v. Stephens*, 353 F.2d 129, 129-42 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966), or *Feguer v. United States*, 302 F.2d 214, 214-36 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

410. See, e.g., NUSSBAUM, *supra* note 27, at 72-78, 86-90 (discussing the proper role of emotions in judging). Justice Blackmun himself stated that "compassion need not be exiled from the province of judging." *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

411. For example, in *Rochin v. California*, 342 U.S. 165 (1952), Justice Frankfurter wrote:

We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism . . . and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

or emotionally involved in the case. Commentators have sometimes perceived just such a danger in Justice Blackmun's opinions.⁴¹² By departing significantly from opinion-writing conventions, Justice Blackmun's personal comments and emotional tone threaten readers' confidence in his objectivity⁴¹³—even if the reader would find the same comments and tone both appropriate and compelling in another forum.

b. Missing the Point

Justice Blackmun's approach to death penalty cases led him to miss the essential issue confronting the Court in these cases. His opinions reveal a narrow, fact-based approach that focused on the propriety of imposing the penalty in a particular case.⁴¹⁴ This approach contrasts markedly with the broader examination of the legitimacy of the punishment itself favored by Justices at both ends of the death penalty spectrum.⁴¹⁵ In fairness, *Gregg's*

Id. at 170-72. See also Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion*, 45 DEPAUL L. REV. 633, 637 (1996) (describing an "impersonal, disinterested and detached judge" as the generally accepted ideal).

412. See, e.g., WILLIAM DOMNARSKI, *IN THE OPINION OF THE COURT* 74 (1996) (noting that in *DeShaney* "there is power in Blackmun's dissent, but at the same time the level of personal involvement that he brings to it highlights its subjective nature, which in turn undermines its effectiveness"); Tushnet, *supra* note 22, at 301-02 (noting that in Justice Blackmun's *DeShaney* opinion "there is nothing other than compassion, no awareness that [the] case stands for a broader set of circumstances that will inevitably be regulated by the rule the Court adopts"). Critics make a similar comment with respect to the story. Kirchberger notes that "clemency can amount to caprice, bearing resemblance to lawlessness." KIRCHBERGER, *supra* note 329, at 34 (speaking of the officer's release of the prisoner). Similarly, Greenberg concludes that "[l]awless sentimentality takes the place of implacable judgment." GREENBERG, *supra* note 350, at 204 (discussing the release of the prisoner).

413. See Ferguson, *supra* note 388, at 207-08 (suggesting that the "presumed removal of personal predilections allows all parties to accept a compelled decision, one that every fair judge would reach despite differences in style and approach").

414. See generally Tushnet, *supra* note 22, at 311 (describing Justice Blackmun's constitutional jurisprudence generally as "succumbing to . . . particularity").

415. Justices Brennan and Marshall maintained from *Furman* onward that capital punishment is "in all circumstances" cruel and unusual punishment that violates the Eighth Amendment. See *supra* note 18. For a description of the subtle differences between the views of Justices Brennan and Marshall, see Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 159-60 (1994). Justices Scalia and Rehnquist, on the other hand, insisted that capital punishment is legitimate, and found it unnecessary to engage in painstaking examination of all the facts of each case. See, e.g., *Walton v. Arizona*, 497 U.S. 639, 663 (1990) (Scalia, J., concurring in part and in judgment) (complaining that

convoluted formulation—that death “is not a form of punishment that may never be imposed”⁴¹⁶—invites just such a narrow inquiry. Failing either to approve the death penalty broadly or to condemn it outright, *Gregg* provides that death may be imposed in some cases, under some circumstances. Justice Blackmun took seriously *Gregg*’s mandate to review carefully the sentence in each case.⁴¹⁷ Given the deferential posture Justice Blackmun outlined in *Furman* and *Gregg*, one might have expected him to vote regularly to uphold the penalty. Yet, Justice Blackmun’s voting record reveals rather conclusively that he had, in fact, decided the overarching question of the legitimacy of capital punishment by about 1985.⁴¹⁸ Although Justice Blackmun shied away from categorical pronouncements on the death penalty and continued to employ a case-by-case approach, the infrequency of his votes to approve the penalty in the wide range of cases before the Court suggests that he had rejected capital punishment all but completely long before *Callins*. By continuing to maintain the legitimacy of the punishment while almost systematically disapproving its application in specific cases, Justice Blackmun missed the point of the inquiry and failed to realize that his decisions effectively answered the question he would not address directly.

To suggest a way to reconcile Justice Blackmun’s case-by-case approach with his record of overwhelming disapproval of the death penalty, I return to Kafka’s story. In the story, the explorer avoids rendering judgment on the morality of the colony’s execution practice. Mendelsohn states bluntly that the explorer “decide[d] upon the irrelevant”—the machine and its method, ignoring the essential question of “whether the ritual should continue.”⁴¹⁹ But even the explorer’s narrow decision has a far-reaching impact, effectively dooming the colony’s execution practices.⁴²⁰

Certain characteristics of the machine, along with its ultimate malfunction, demonstrate the futility of the explorer’s approach. The machine is described in

the *Woodson-Lockett* principle prohibits states from excluding evidence of “any aspect of a defendant’s character or record, or any circumstance surrounding the crime,” and listing evidence sentencers need not have considered); *Herrera v. Collins*, 506 U.S. 390, 401-02 (1993) (majority opinion of Chief Justice Rehnquist) (stating that federal court’s inquiry in habeas cases “does not permit [the] court to make its own subjective determination of guilt or innocence” (quoting *Jackson v. Virginia*, 443 U.S. 307, 320 (1979))). All these Justices defined the issue, more or less, as the legitimacy of the punishment generally.

416. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

417. *Gregg*’s emphasis, however, seems to be on review by the highest state court to ensure proportionality and fairness. *Id.* at 198.

418. See *infra* Appendix I (showing that from 1986 through 1994, Justice Blackmun voted to impose death in only nine percent of all death penalty cases).

419. Mendelsohn, *supra* note 344, at 212.

420. Mendelsohn, *supra* note 344, at 212. Though the explorer downplays his decision, the officer clearly sees its impact, concluding that “the time has come” to set free the prisoner and subject himself to the machine. Kafka, *supra* note 26, at 230.

the opening line of the story as "a remarkable piece of apparatus."⁴²¹ It is large,⁴²² consists of numerous parts,⁴²³ and requires painstaking adjustments.⁴²⁴ The officer has to explain the machine at length before the explorer understands it.⁴²⁵ The plans for the machine are incomprehensible to the explorer, who sees only "a labyrinth of lines crossing and re-crossing each other, which covered the paper so thickly that it was difficult to discern the blank spaces between them."⁴²⁶ The officer complains bitterly of the machine's frequent breakdowns and notes that when he cobbles it together using substitute parts, its effectiveness is impaired.⁴²⁷ In the end the machine goes berserk, inflicting death not in the intricate, revelatory way originally envisioned, but by brutally and grotesquely stabbing the officer through the forehead with a great iron spike.⁴²⁸ In the story, this grisly malfunction is made to seem surprising.⁴²⁹ In fact, according to Kirchberger, the machine could not possibly function as described.⁴³⁰ She explains that the machine's use of straps to keep the condemned's body immobile is inherently at odds with the idea that the machine turns the man's body slowly to inscribe the sentence "round the body in a narrow girdle."⁴³¹ Another impossibility occurs near the end of the story. After goring the officer, the machine raises his body from the bed, despite the straps, and dumps it into the pit below.⁴³² Finding "sense behind the seemingly nonsensical construction of the machine," Kirchberger describes the machine as "the brilliantly conceived literary image of a legal theory that can never work."⁴³³ Thus, it is hardly

421. Kafka, *supra* note 26, at 217.

422. Kafka, *supra* note 26, at 217. The officer had to use a ladder to inspect the machine's uppermost parts. Kafka, *supra* note 26, at 217, 219 (calling the machine a "huge affair").

423. Kafka, *supra* note 26, at 218 (describing the Bed, the Harrow, and the Designer).

424. Kafka, *supra* note 26, at 231 (describing precision with which officer had to regulate the machinery).

425. Kafka, *supra* note 26, at 217-24.

426. Kafka, *supra* note 26, at 222.

427. Kafka, *supra* note 26, at 224 (describing use of a chain to replace a broken strap).

428. Kafka, *supra* note 26, at 234.

429. KIRCHBERGER, *supra* note 329, at 25 (describing Kafka's "diversionary tactics" and suggesting that few readers will understand the "nonfunctionality of the machine itself").

430. KIRCHBERGER, *supra* note 329, at 25.

431. KIRCHBERGER, *supra* note 329, at 25. But Kirchberger notes that Kafka "has not forgotten the straps," one of which breaks while the officer fastens the prisoner into the bed of the machine. KIRCHBERGER, *supra* note 329, at 25.

432. KIRCHBERGER, *supra* note 329, at 26.

433. KIRCHBERGER, *supra* note 329, at 26-28 (describing a "casuistic" legal system of the type posited by Rudolf von Jhering, a nineteenth century jurist she believes

surprising that the machine eventually malfunctions in a horrible, brutal way. The explorer's mild disapproval of the execution practice entirely misses the point of the machine's inherent flaws and inevitable malfunction.

Kafka's story suggests a new assessment of Justice Blackmun's capital punishment jurisprudence. This interpretation concludes that the inherent deficiencies in death penalty law make principled case-by-case determinations impossible. That leaves the legitimacy of the punishment itself as the only question for the Court to answer.

Like the machine, modern death penalty jurisprudence is complex and inherently contradictory. The image of the machine's labyrinthine plans is apt. Dozens of decisions handed down over the past three decades densely fill in the outline of death penalty law, but fail to lay down rules with clarity and conviction. The abstruse nature of death penalty law stems from the recent history of its development. First, the Court has shown an unusual willingness to reverse its course. In one five-year period, the Court upheld the penalty in *McGautha*,⁴³⁴ struck it down in *Furman*,⁴³⁵ and then reauthorized the penalty in *Gregg*.⁴³⁶ Similarly, the Court decided three victim-impact evidence cases between 1987 and 1991, again abruptly changing course.⁴³⁷ These about-faces reflect a troubling instability in the law.⁴³⁸ Second, many death penalty decisions are characterized by multiple opinions and bitter disagreements among members of the Court. *Furman*⁴³⁹ is the paradigm: though labeled a per curiam opinion of the Court, it is in fact a series of nine separate signed opinions, barely held together by the three nearest the center. *Gregg*⁴⁴⁰ is not much better, a three-Justice plurality decision with a total of six opinions. These splintered decisions, and others like them, utterly fail to establish clear, coherent rules.

Compounding the complexity caused by reversals and splintered decisions is a fundamental flaw in death penalty law. This flaw inheres in the irreconcilable mandates of *Furman* and *Lockett*, both of which ostensibly still

influenced Kafka).

434. 402 U.S. 183 (1971).

435. 408 U.S. 238 (1972) (per curiam).

436. 428 U.S. 153 (1976).

437. Compare *South Carolina v. Gathers*, 490 U.S. 805 (1989) (disallowing prosecutor's statements about victim at sentencing phase), and *Booth v. Maryland*, 482 U.S. 496 (1987) (excluding victim impact evidence from capital sentencing phase), with *Payne v. Tennessee*, 501 U.S. 808 (1991) (allowing victim impact evidence and overruling *Gathers* and *Booth*).

438. In *Payne*, the Court quotes a state court judge's comment that the "fact that the majority and two dissenters in [the Ohio] case all interpret the opinions and footnotes in *Booth* and *Gathers* differently demonstrates the uncertainty of the law in this area." *Payne*, 501 U.S. at 829 (quoting *State v. Huertas*, 553 N.E.2d 1058, 1070 (1990) (Moyer, C.J., concurring)).

439. 408 U.S. 238 (1972) (per curiam).

440. 428 U.S. 153 (1976).

control death penalty decisions.⁴⁴¹ As the Court strove to apply these two cases over the years, the difficulty became clear.⁴⁴² In *Lockett* itself, Justice White described the Court's result as an "about-face" from *Furman*, marking a return, under the guise of mitigating evidence, to a sentencing system characterized by "unguided discretion."⁴⁴³ In *Eddings*, Justice Powell strained to reconcile *Lockett* with *Furman*, *Gregg*, and *Woodson*, describing the "rule in *Lockett* [as a] recogni[tion] that a consistency produced by ignoring individual differences is a false consistency."⁴⁴⁴ In *California v. Brown*, Justice O'Connor described the "tension that has long existed between the two central principles of our Eighth Amendment jurisprudence."⁴⁴⁵ Finally, in *Callins*, Justice Blackmun asserted that the Court had "virtually conceded" in *McCleskey v. Kemp*⁴⁴⁶ that *Furman* and *Lockett* were irreconcilable.⁴⁴⁷ Justices Scalia and Thomas had earlier noted this dilemma, resolving it by rejecting the *Lockett* line of cases.⁴⁴⁸ Justice Blackmun, however, found it "wholly inappropriate," in death penalty jurisprudence, "to sacrifice one [constitutional command] for the other [competing command] or to assume that an acceptable balance between them has already been struck."⁴⁴⁹ He believed the Court had retreated from the demands of both *Furman* and *Lockett*, and had "chosen to deregulate the entire enterprise."⁴⁵⁰ Instead, the Court should "admit the futility of the effort to harmonize them," knowing that as a consequence "the death penalty cannot be administered in accord with our Constitution."⁴⁵¹

441. See *Callins v. Collins*, 510 U.S. at 1141, 1147 (1994) (Blackmun, J., dissenting from denial of certiorari).

442. See *supra* notes 203-06 and accompanying text.

443. *Lockett v. Ohio*, 438 U.S. 586, 622 (1978) (White, J., concurring in part, dissenting in part, and concurring in judgment). See also *Graham v. Collins*, 506 U.S. 461, 494 (1993) (Thomas, J., concurring); *Walton v. Arizona*, 497 U.S. 639, 657-67 (1990) (Scalia, J., concurring in part and in judgment); *Lockett*, 438 U.S. at 629-31 (Rehnquist, J., dissenting) (noting that consideration of mitigating circumstances would unleash sentencing discretion, not guide it).

444. *Eddings v. Oklahoma*, 455 U.S. 104, 112-13 (1982).

445. 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) (contrasting *Gregg*'s requirement of consistency with the *Lockett-Eddings* focus on the individual defendant).

446. 481 U.S. 279 (1987).

447. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing *McCleskey*, 481 U.S. at 313 n.37).

448. See *Walton v. Arizona*, 497 U.S. 639, 672-73 (1990) (Scalia, J., concurring in part and in judgment) (vowing that he would not "vote, in this case or in the future, to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted"); *Graham v. Collins*, 506 U.S. 461, 478-79 (1993) (Thomas, J., concurring) (calling for a narrow reading or reversal of *Penry v. Lynaugh*, 492 U.S. 302 (1989), which he terms the "most extreme statement in [the] 'mitigating' line" of cases).

449. *Callins*, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari).

450. *Id.*

451. *Id.* at 1157.

The conclusion of several Justices that the two major lines of decisions—*Furman* and *Lockett*—impose irreconcilable commands is just another way of saying that the system cannot work. With their inherent flaws, neither the machine nor the law can possibly function as intended. The machine's internal contradictions doom it to ultimate failure in the form of a fatal malfunction. Similarly, death penalty law's fundamental contradictions make rational, principled decisions impossible. In an inherently flawed system, deciding whether the system worked properly in a given case makes no sense. If that is the case, then Justice Blackmun's case-by-case, factual, "proceduralist tack"⁴⁵² is beside the point. Time after time, Justice Blackmun denounced procedures leading to the imposition of the death sentence.⁴⁵³ But just as the officer cannot keep the defective machine going with spare parts, Justice Blackmun eventually conceded in *Callins* that no procedural safeguards could salvage such a defective system of punishment.⁴⁵⁴ This interpretation suggests that the legitimacy of the punishment itself is the only question for the judge to answer.

Throughout his tenure, Justice Blackmun adopted a narrow focus in capital punishment cases. Early on, he appeared to view the issue as a relatively simple (if personally troubling) one. If the states chose to impose this penalty, he would not stand in their way, despite his personal opposition to it, provided that the penalty was imposed in accordance with the dictates of the Constitution.⁴⁵⁵ At this stage, Justice Blackmun's inquiry whether capital punishment contravened the Eighth Amendment's ban on cruel and unusual punishments was a narrow one. He concluded that the punishment was legitimate because the Constitution clearly contemplated its use and the Court had repeatedly approved it.⁴⁵⁶ Above all, he deferred to the legislature's judgment that the death penalty was a legitimate punishment, obviating the need to engage in that inquiry himself.⁴⁵⁷ But beginning with *Lockett*, Justice Blackmun began to look more closely at how the penalty was applied in each case.⁴⁵⁸ This approach forced Justice Blackmun to focus on the facts of each case—not only the facts of the crime and the

452. *Lockett v. Ohio*, 438 U.S. 586, 616 (1978) (Blackmun, J., concurring in part and in judgment); see also *id.* at 615 (noting that the case provided the "occasion for setting some limit to the *method* by which the states assess punishment") (emphasis added).

453. See *supra* notes 225-73 and accompanying text.

454. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

455. See, e.g., *id.* at 1146-50 (discussing cases from *Furman* through *Lockett*); *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J. dissenting).

456. See, e.g., *Furman*, 408 U.S. at 408 n.6 (Blackmun J., dissenting) (discussing Eighth Amendment); *id.* at 407-08 (discussing Supreme Court precedents).

457. *Id.* at 410-11.

458. See, e.g., Blais, *supra* note 5, at 519-20 (describing Blackmun's "common-law approach").

characteristics of the defendant, but also on the details of the arrest, questioning, trial, appeals, and representation of the defendant.⁴⁵⁹

Blais asserts that "Justice Blackmun's capital punishment jurisprudence . . . epitomize[s] the virtues of jurisprudential humility."⁴⁶⁰ Describing Blackmun's "incremental, common-law approach" to death penalty cases, she defends his "conviction that the contours of the Eighth Amendment must be revealed incrementally and exposed at the interstices of the law and facts [b]y means of careful attention to . . . real-life application of state capital punishment schemes to actual crimes and defendants."⁴⁶¹ Recall the description of the plans for the machine as a "labyrinth of lines" that "covered the paper so thickly that it was difficult to discern" the interstices between them.⁴⁶² After a time, Justice Blackmun's (and the Court's) case-by-case approach to the death penalty yielded a similar, unsatisfactory result.⁴⁶³ Moreover, it is a "myth" that the Supreme Court can be "equated" with an "ordinary" (*i.e.*, common-law) court.⁴⁶⁴ Rather, this Court decides cases of far broader import, "expounding[] a Constitution designed to endure for ages to come."⁴⁶⁵ This analysis suggests that Justice Blackmun—and the Court itself—must either reject the practice outright, or accept it, despite its flaws, because it advances some other more important value. The Supreme Court's obligation is to decide this question of legitimacy.

To reach the heart of the matter, Justice Blackmun would have had to decide, to use Mendelsohn's term, the "morality" of capital punishment in our society.⁴⁶⁶ The Court's capital punishment jurisprudence has long invited such an inquiry by incorporating contemporary standards of decency into the determination of constitutionality.⁴⁶⁷ Justice Blackmun was always aware of some moral dimension of the death penalty. As early as *Furman*, he described

459. Analogies to Justice Blackmun's approach on abortion, another great moral controversy facing the Court during his tenure, are inescapable. There, too, Justice Blackmun focused on the facts at the expense, his critics say, of providing a clear, compelling answer to a fundamental question. See *Roe v. Wade*, 410 U.S. 113 (1973).

460. Blais, *supra* note 5, at 519.

461. Blais, *supra* note 5, at 520.

462. Kafka, *supra* note 26, at 222.

463. Cf. *Graham v. Collins*, 506 U.S. 461, 488-89 (1993) (Thomas, J., concurring) (noting that the "Court has put itself in the seemingly permanent business of supervising capital sentencing procedures" by abolishing mandatory death penalty statutes and opening way for consideration of any relevant mitigating evidence).

464. ARTHUR S. MILLER, *THE SUPREME COURT: MYTH AND REALITY* 23 (1978).

465. *Id.*

466. Mendelsohn, *supra* note 344, at 212. See also Greenberg, *supra* note 350, at 204 (noting that explorer faces a moral choice between the old regime and the new).

467. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (relying on "evolving standards of decency that mark the progress of a maturing society"); *Weems v. United States*, 217 U.S. 349, 378 (1910) (stating the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice").

imposition of the penalty as a "moral judgment exercised by finite minds."⁴⁶⁸ And as late as *Callins*, he said he felt "morally . . . obligated to concede that the death penalty experiment has failed."⁴⁶⁹ The tone of these comments highlights Justice Blackmun's reluctance to tackle this great moral question. Of course, deciding moral issues is not what we ordinarily expect of judges.⁴⁷⁰ Rather, such questions are usually left to the legislature.⁴⁷¹ We prefer to think of death penalty cases as presenting precise legal issues appropriate for judicial decision. But the question whether death—regardless of method or procedure—is cruel and unusual punishment may amount to an irreducible moral question: Has this punishment any place in our society?

Several Justices concluded that the question is, ultimately, a moral one. Justices Marshall and Brennan both believed that the death penalty "presented a constitutional question which could not be addressed without also examining its moral implications."⁴⁷² Justice Brennan described the nation's debate over capital punishment as an "essentially moral conflict."⁴⁷³ Justice Marshall stated categorically in *Furman* that capital punishment "violates the Eighth

468. *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

469. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun's use of the word "experiment" is odd. Hardly the test of a hypothesis in an artificial setting, the death penalty, as the Court has repeatedly recognized, is a harsh and irremediable reality to those upon whom it is imposed. See, e.g., *Sullivan v. Wainwright*, 464 U.S. 109 (1983) (per curiam) (stating that "the death sentence is qualitatively different from all other sentences"). Perhaps Justice Blackmun viewed capital punishment as an experiment to determine whether this penalty was more effective than other sentences in achieving societal goals, such as deterrence of crime, that were often used to justify its imposition. But the word "experiment" may also reflect Justice Blackmun's subconscious desire to distance himself from what he had earlier called an "excruciating agony of the spirit." *Furman*, 408 U.S. at 405 (Blackmun, J., dissenting).

470. But see Bigel, *supra* note 415, at 162 (stating that it may be difficult for judges "to separate perceptions of constitutionality from personal views of morality"); Carter, *supra* note 408, at 1198 (noting that in constitutional adjudication, judges cannot completely divorce interpretation from their "background morality").

471. See, e.g., ROBERT BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 11 (1984) (stating that "in a constitutional democracy the moral content of the law must be given by the morality of the framer or the legislator, never by the morality of the judge").

472. Bigel, *supra* note 415, at 162.

473. *Furman v. Georgia*, 408 U.S. 238, 296 (1974) (Brennan, J., concurring). As Justice Brennan's opinion demonstrates, morality is an important consideration in any system of punishment, for punishments are designed to reflect the public's "moral indignation" with crimes, to provide "moral reinforcement for the basic values of the community," and to "strengthen the community's moral code." *Id.* at 303. These concerns relate to the legitimacy of the punishment, not the manner of its imposition or its suitability in a particular case. See *id.* at 342 (Marshall, J., concurring) (discussing moral justification for punishment).

Amendment because it is morally unacceptable to the people of the United States at this time in their history."⁴⁷⁴ But Justices who believed capital punishment to be legitimate also described the issue as a moral one. Chief Justice Burger noted that the "standard of extreme cruelty . . . necessarily embodies a moral judgment."⁴⁷⁵ Justice Thomas remarked that "any determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one."⁴⁷⁶ Chief Justice Rehnquist observed that "[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed."⁴⁷⁷ Justice Scalia elaborated that "the procedural elements of a sentencing scheme come within the prohibition [of the Eighth Amendment], if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment 'unusual.'"⁴⁷⁸ Thus, to argue that the question is a broad moral one does not compel any particular conclusion on the legitimacy of the penalty.

Justice Blackmun, by contrast, concentrated on the far narrower question of the propriety of imposing the penalty in a particular case. This tactic is not new. Robert Cover wrote: "The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, seek the shelter of separation of powers."⁴⁷⁹ By focusing on the particulars of each case, rather than categorically rejecting the penalty, Justice Blackmun found, wittingly or unwittingly, a way to vote according to his own conscience while clinging to the value of deference. As he noted in *Furman*, "[t]o reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death."⁴⁸⁰ It seems all the more likely that a judge would vote to reject a death sentence when he or she is compelled to examine closely the circumstances of each case and to scrutinize

474. *Id.* at 360 (Marshall, J., concurring). Of course, the rush of states to reenact death penalty statutes has proved Justice Marshall wrong on this point.

475. *Id.* at 382 (Burger, C.J., dissenting); *see id.* at 385 (referring to "punishment[s] such as burning at the stake that everyone would ineffectually find to be repugnant to all civilized standards" regardless of the nature of the crime or the procedures leading to imposition of the punishment).

476. *Graham v. Collins*, 506 U.S. 461, 494 (1993) (Thomas, J., concurring). Justice Thomas took pains to distinguish this broad moral determination from a narrow "moral response" that "may allow the sentencer to express benevolence . . . [or] to cloak latent animus" toward an individual defendant. *Id.*

477. *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting).

478. *Walton v. Arizona*, 497 U.S. 639, 670 (Scalia, J., concurring in part and in judgment).

479. COVER, *supra* note 382, at 201 (noting that it is possible, nevertheless, to "defin[e] . . . judicial problems as moral ones").

480. *Furman v. Georgia*, 408 U.S. 238, 410 (1972) (Blackmun, J., dissenting). In *Furman*, of course, Justice Blackmun voted to impose death.

the trial and sentencing procedures. Focusing on the individual defendant to whom the penalty would be applied might make it harder to ignore even meager doubts about the sufficiency of the evidence or minor errors in the proceedings below. Justice Blackmun could thus use the facts of each case to decide against the penalty without passing judgment on the broader moral question. But in so doing, he missed the essential point: it is the legitimacy of the punishment that the Court must determine.

Though Justice Blackmun's decisions rejecting the penalty on relatively narrow grounds fail to address the essential issue, he is alone neither in his desire to avoid ruling on an enormous moral issue nor in his belief that to do so would exceed the bounds of his role as a judge.⁴⁸¹ And it would be unfair to expect Justice Blackmun to have understood that the fundamental flaws in death penalty law left only the legitimacy of capital punishment at issue when other Justices, too, failed to recognize immediately the *Furman-Lockett* tension. But in his persistent refusal to take an unequivocal stand on the legitimacy of the penalty, Justice Blackmun ruled explicitly only on the "accident" of the method of sentencing and execution. And he seems unaware that, in rejecting the penalty over and over again on the facts, he implicitly decided the far broader issue of the legitimacy of capital punishment.

3. Escape

In the Penal Colony ends with the explorer's escape from the island. After watching as the officer is impaled on the machine, the explorer (with the soldier and the prisoner in tow) comes to a tea-house.⁴⁸² There, he views the tombstone of the old Commandant and learns of a prophecy that he will rise again and recover the colony.⁴⁸³ The explorer hastens to the harbor, where he hires a ferry to take him out to a steamer, which presumably had transported him to the island

481. Cover asserts that "[w]henver judges confronted the moral-formal dilemma, they almost uniformly applied the legal rules." COVER, *supra* note 382, at 199 (discussing antislavery judges). Justice Blackmun was, of course, not alone in treating the question of capital punishment narrowly. Justices Stevens and O'Connor view the question as a moral one calling for a case-by-case determination. Justice Stevens wrote in *Spaziano v. Florida*, for example, that capital punishment rests on a relatively narrow moral question: "an assessment of what [the Court] called in *Enmund* the 'moral guilt' of the defendant." 468 U.S. 447, 481 (1984) (Stevens, J. concurring in part, dissenting in part). Similarly, Justice O'Connor stated: "[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime [I]ndividualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

482. Kafka, *supra* note 26, at 234.

483. Kafka, *supra* note 26, at 234.

in the first place.⁴⁸⁴ The soldier and the prisoner try to board the ferry, but the explorer holds them off, threatening them with a heavy, knotted rope, and escapes alone.⁴⁸⁵ This abrupt ending puzzles readers and apparently failed to satisfy Kafka as well, for he is said to have written several other versions later.⁴⁸⁶

Justice Blackmun's "escape"—his retirement from the Court almost immediately following his announcement in *Callins*—is also puzzling. The *Callins* announcement came in an opinion dissenting from the denial of certiorari.⁴⁸⁷ Such opinions are rare.⁴⁸⁸ Thus it seems that Justice Blackmun may have intended to call attention to his statement abandoning the death penalty. Ordinarily, opinions serve forward-looking purposes, such as guiding future conduct and predicting the future decisions of a judge or court.⁴⁸⁹ It is odd, then, that Justice Blackmun's announcement came only when he was about to leave the Court—an action that would make his change of views largely irrelevant, except to history. If it is true, as some have reported, that a draft of what became the *Callins* announcement had circulated within Justice Blackmun's chambers for several years,⁴⁹⁰ one wonders why he did not issue it while time remained to vote accordingly and to try to persuade his fellow Justices to do likewise. Pascal observes that after the "unmitigated murder" of the officer, the explorer "wants to intervene, but it is too late; he cannot even get the two soldiers to help him release the impaled body."⁴⁹¹ By the time Justice Blackmun announced his opposition in *Callins*, Justices who held similar views had already left the Court. The Court had grown more conservative in general, and more hostile toward capital punishment cases in particular. Justice Blackmun's announcement stood little chance of changing the Court's direction.

Furthermore, although Justice Blackmun wrote passionately in *Callins*, it is not perfectly clear what position he espoused. He concluded with the "belief[f] that the death penalty, *as currently administered*, is unconstitutional."⁴⁹² This formulation appears to leave the question open. But though he quotes that

484. Kafka, *supra* note 26, at 235.

485. Kafka, *supra* note 26, at 235.

486. See, e.g., KIRCHBERGER, *supra* note 329, at 38; Steinberg, *supra* note 329, at 513; Weinstein, *supra* note 384, at 222.

487. *Callins v. Collins*, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting from denial of certiorari).

488. Cf. JOSEPH F. MENEZ, DECISION MAKING IN THE SUPREME COURT OF THE UNITED STATES: A POLITICAL AND BEHAVIORAL VIEW 21-23 (1984) (discussing the practice of a few Justices to dissent from the denial of certiorari).

489. See, e.g., FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 171 (1994) (noting that appellate opinions "project[] the story into the future by giving intimations of further directions").

490. Totenberg, *supra* note 4, at 747.

491. PASCAL, *supra* note 28, at 86.

492. *Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting from denial of certiorari) (emphasis added).

statement,⁴⁹³ Justice Scalia reads Justice Blackmun's announcement as meaning that "the death penalty is *always* unconstitutional."⁴⁹⁴ Justice Blackmun himself holds out little real hope that any constitutional manner of imposing the death penalty can be found,⁴⁹⁵ and his voting record from *Lockett* onward lends support to that conclusion. Nevertheless, in *Callins* and in a handful of post-*Callins* appeals,⁴⁹⁶ Justice Blackmun steered clear of a categorical statement.

Literary critics view the explorer's escape as inconclusive (at best) or cowardly (at worst). To the extent that the inconclusive ending "tells us that these are problems that are not settled but still have to be wrestled with[.]"⁴⁹⁷ some critics find it an appropriate response to an impossible dilemma. Moreover, the explorer's departure may signify "a return to the detachedness" he displayed early in the story as the officer explained the machine's workings to him.⁴⁹⁸ But while "his refusal to become involved initially reflect[ed] only professional principle, . . . at the end it highlights [the explorer's] 'learning' Kafka's point" that "tolerance and suspended judgment are called for in matters of relative morality."⁴⁹⁹ On this theory, Justice Blackmun's announcement on the eve of retirement can be viewed as a concession that the death penalty issue is an impossibly difficult moral issue which he, as judge, cannot presume to answer. No longer clinging to the "professional principles" of deference and stare decisis, Justice Blackmun tried, after *Lockett*, to reconcile the need for individual sentencing with the limitations inherent in the judge's role. In the end, the best he could do was to state candidly his own views, for what they may be worth, no matter how unusual that course of action may be for a judge.

Other assessments of the explorer's "panic flight from the colony"⁵⁰⁰ are not so benign. To begin with, the explorer's flight calls into question his commitment to his own judgment and "makes us dubious about the superiority of his humanitarian principles to the inhuman but selfless devotion of the officer."⁵⁰¹ According to Pascal, the explorer's escape allowed him to retain his role as a mere observer.⁵⁰² He notes that

[t]he ship will rescue [the explorer] from any necessity of intervening, and, fleeing, he refuses to take with him those who would, by their

493. *Id.* at 1141 (Scalia, J., concurring).

494. *Id.* at 1143 (emphasis added).

495. *Id.* at 1159 (Blackmun, J., dissenting from denial of certiorari).

496. *See, e.g.,* *Victor v. Nebraska*, 511 U.S. 1, 38 (1994) (Blackmun, J., concurring in part and dissenting in part).

497. PASCAL, *supra* note 28, at 89.

498. Kramer, *supra* note 363, at 206.

499. Kramer, *supra* note 363, at 206.

500. PASCAL, *supra* note 28, at 61.

501. PASCAL, *supra* note 28, at 61.

502. PASCAL, *supra* note 28, at 77.

mere existence, infect his own sheltered world with their problem and perpetuate his consciousness of failure.⁵⁰³

This harsh criticism, which may seem to apply as well to Justice Blackmun, is tempered by the recognition that the question does not lend itself to easy resolution.⁵⁰⁴ A judge has few alternatives when he or she concludes, as Justice Blackmun ultimately did, that the law he or she is asked to apply is unjust.⁵⁰⁵ The judge may use all available methods of construction and interpretation to reach a result he or she can live with.⁵⁰⁶ The judge may resign, explaining the problem; recuse himself or herself from future decisions on the issue; or follow the law under protest.⁵⁰⁷ Or the judge may deliberately depart from the law, risking the penalty for such actions.⁵⁰⁸ None of these courses of action is promising. The first, if stretched too far, is at odds with the judge's fundamental obligation to apply the law. Resignation and recusal look like abdication of responsibility. Following the law under protest, as Justice Blackmun sometimes did, may seem unprincipled. Even dissenting, a judge may, by continuing to participate, lend support to the law with which he or she disagrees.⁵⁰⁹ Civil disobedience is, for most judges, unthinkable.

Perhaps the best the judge can do is to try to effect change "within the bounds of the system" in which he or she operates.⁵¹⁰ Justice Blackmun seems to have followed that approach. Though he deferred to the legislative determination to permit capital punishment, he took full advantage of developments in the law, most notably the *Lockett-Eddings* requirement of individualized sentencing, to review death penalty cases in a manner that can hardly be called deferential. He became increasingly unwilling to defer to the conclusion that the death penalty was validly imposed in a given case. Justice Blackmun's frustration grew as the Court became more deferential and less inclined to undertake searching review. After admitting in *Callins* that he could

503. PASCAL, *supra* note 28, at 77.

504. PASCAL, *supra* note 28, at 89.

505. See generally COVER, *supra* note 382, at 229-38 (describing the likely behavior of judges confronted with moral-legal dilemmas, including heightened adherence to formal obligation, mechanical adherence to precedent, and reliance on doctrines such as separation of powers to ascribe responsibility to others).

506. Robert W. Sweet, *The Judge's Dilemma: Duty or Conscience*, 19 CARDOZO L. REV. 1041, 1044 (1997).

507. *Id.* at 1044-45.

508. Stephen Ellmann, *To Resign or Not to Resign*, 19 CARDOZO L. REV. 1047, 1052 (1997). Judge Sweet notes that reversal is one expected consequence of such an action. Sweet, *supra* note 506, at 1045. This suggestion highlights the special obligation, and heightened tension, for a Supreme Court Justice, who cannot count on someone farther up the line to set matters straight.

509. Ellmann, *supra* note 508, at 1057.

510. Ellmann, *supra* note 508, at 1052.

not reconcile his approach with the Court's inhospitality to review, Justice Blackmun was left with explaining the constitutional dilemma he could not resolve.

Pascal sums up the story:

[W]hen a choice between opposing actions becomes imperative, Kafka's [explorer] refuses to sacrifice his principles to a morality they condemn but at the same time, shrinking from intervening with actions that conform to his principles, also fails to . . . act upon, those natural and human responses that are the ground and justification of these principles. He finds a third way that seems to him to preserve his principles and his character as an enlightened man of reflection, the way of flight from the circumstances that made a choice necessary.⁵¹¹

The story's ending, "perpetuates the doubts and problems that the incidents of the story have given rise to."⁵¹² The same can be said of the strange conclusion of Justice Blackmun's death penalty odyssey. Just as the story is "disturbing" because it is "morally and intellectually equivocal,"⁵¹³ Justice Blackmun's opinion in *Callins* is a troubling ending to his equivocal death penalty jurisprudence. The story's ending, though "perhaps morally unsatisfactory," is "truer to the experience of the story than would be a conclusive ending."⁵¹⁴ Readers must "adjust" their "aesthetic response . . . to this truth."⁵¹⁵ Citizens demand more of the law.

V. CONCLUSION

In the Penal Colony culminates with an abrupt reversal that precipitates the explorer's escape.⁵¹⁶ The officer, finally comprehending that the explorer will not endorse the execution practice, frees the prisoner and prepares to subject himself to the machine.⁵¹⁷ The sentence he proposes to inscribe upon himself is a lofty, if "vacuous"⁵¹⁸ one: "Be Just!"⁵¹⁹ If we accept the officer's premise that "guilt is never to be doubted,"⁵²⁰ then the officer himself must also be guilty.⁵²¹

511. PASCAL, *supra* note 28, at 89.

512. PASCAL, *supra* note 28, at 78.

513. GREENBERG, *supra* note 350, at 205.

514. PASCAL, *supra* note 28, at 78.

515. PASCAL, *supra* note 28, at 78.

516. Weinstein, *supra* note 384, at 222.

517. Kafka, *supra* note 26, at 230-31.

518. THIHER, *supra* note 329, at 52.

519. Kafka, *supra* note 26, at 231.

520. Kafka, *supra* note 26, at 220.

521. THIHER, *supra* note 329, at 59. Other critics have suggested that the officer may, however, be innocent. See, e.g., E.R. Davey, *The Broken Engine: A Study of Franz*

But the commandment "Be Just!" is the "most general of all principles" and the "emptiest of commands."⁵²² The officer's guilt might lie in releasing the prisoner (a dereliction of his duty), in exercising mercy in place of the perfect justice demanded by the old regime, or in failing to keep the machine—and the legal system it represents—in working order. Instead of inscribing the sentence, the machine jabs the officer, finally goring him through the forehead and killing him instantly.⁵²³

The machine's horrible malfunction may signify a fitting end to an inhumane, unjust system of punishment.⁵²⁴ As Kramer notes, the "officer lacks not justice . . . but compassion,"⁵²⁵ an essential quality in a morally acceptable system of justice. On this theory, the "machine was asked to perform an unjust lettering"⁵²⁶ because the officer had not breached the chosen commandment, and it rebelled in an act of "poetic justice."⁵²⁷ The uncompassionate officer gets his due in an especially brutal manner. On the other hand, the broken-down machine may signify that it is no longer capable of delivering revelation in any case, only "murderous epiphanies."⁵²⁸ Indeed, given the flaws inherent in the machine's design,⁵²⁹ it may have been a delusion ever to believe the machine could dispense justice.⁵³⁰ In that event, the machine's malfunction represents a "travesty of justice" because revelation never comes to the officer.⁵³¹ This malfunction is only one more example—albeit a particularly grotesque one—of the machine's extreme harshness and its inevitable commission of error. The officer's execution is really no different from any other inflicted by the machine: it is brutal, unjust, and inhumane.

Observing the officer's self-execution, the explorer reacts with horror. Despite his misgivings about the machine, he had grown to admire the officer's unwavering commitment.⁵³² He concludes that the machine's act was one of "plain murder," offering no sign that the promised redemption had taken place.⁵³³ It is unclear whether he thinks the officer's execution was unjust (because the officer was innocent of the charges) or simply that the execution was inhumane (because it was unnecessarily brutal and failed to deliver revelation). The

Kafka's "In der Strafkolonie," in 53 LITERARY CRITICISM, *supra* note 329, at 234.

522. THIER, *supra* note 329, at 59.

523. Kafka, *supra* note 26, at 233-34.

524. See, e.g., Kramer, *supra* note 363, at 207 (noting that there is "no reason to believe that the machine has executed the officer inappropriately").

525. Kramer, *supra* note 363, at 207.

526. Kramer, *supra* note 363, at 207.

527. Weinstein, *supra* note 384, at 222 (describing others' interpretations).

528. THIER, *supra* note 329, at 59.

529. See *supra* notes 421-33 and accompanying text.

530. KIRCHBERGER, *supra* note 329, at 30.

531. Weinstein, *supra* note 384, at 222 (describing others' interpretations).

532. See GREENBERG, *supra* note 350, at 204.

533. Kafka, *supra* note 26, at 233-34.

epilogue makes it clear that the explorer believes the machine's malfunction is not the end of the story. He takes seriously the prophesy that the old Commandant will return, and he flees before the need arises to sit again in judgment of the execution practice.

Justice Blackmun's death penalty jurisprudence also culminates in an apparent reversal, though it was actually a gradual progression whose beginnings were evident even in the Eighth Circuit opinions. There, and in his early years on the Supreme Court, Justice Blackmun steadfastly enforced the death penalty despite his already-admitted personal misgivings.⁵³⁴ Several factors may have led to his *Callins* announcement. First, circuit judges address capital punishment cases knowing there is (at least theoretically) another layer of review. The question is a more ominous one in the court of last resort, and deferential judgment may be far harder to achieve. Second, the first few cases Justice Blackmun decided may have looked very different from the hundreds that followed. The death penalty was in decline during Justice Blackmun's tenure as a circuit judge, while in his last years on the Supreme Court it was imposed and carried out with some frequency. Over time, the states' appetite for capital punishment, along with the Court's tolerance of errors below and its reluctance to review capital punishment cases, eroded Justice Blackmun's confidence that deference was appropriate. Justice Blackmun viewed the Constitution's commandment to be the very same one that the officer would have applied to himself: "Be Just!" In a sense, he may have "learned" this commandment from the procession of cases in the same way those subjected to the inscriptions of Kafka's machine were supposed to experience revelation after several hours. These factors and others doubtless were at work in Justice Blackmun's "transformation." This Article has focused, however, on the interplay between the development of the law and the evolution of Justice Blackmun's conception of judging.

Like the explorer, Justice Blackmun respected the will of the states to select execution as a punishment for horrible crimes. He maintained that judicial deference to this legislative choice was appropriate, particularly in view of the Court's admonition that punishments were to be judged by contemporary standards of decency. Clearly, the public continues to support the death penalty. The role of the judge, then, is simply to determine that the death penalty is imposed in each case in accordance with the Constitution's ban on cruel and unusual punishments. Justice Blackmun's early opinions, in particular, offer compelling evidence of his commitment to apply the law, not his own personal beliefs. But the *Lockett-Eddings* focus on individualized sentencing invited judges to assess for themselves the propriety of imposing the death penalty in each case. When he considered the defendant as an individual, Justice

534. See *Callins v. Collins*, 510 U.S. 1141, 1147-48 (1994) (Blackmun, J., dissenting from denial of certiorari) (noting that although he dissented in *Furman*, he "faithfully . . . adhered" to its holdings).

Blackmun's moral objections to the death penalty usually caused him to vote against its imposition.

As death penalty law developed, it became increasingly contradictory. If the law was inherently unsound as a result of the impossibility of applying both *Furman* and *Lockett*, then the judge's only choice, according to Justice Blackmun, was to refuse to uphold the penalty until the conflict is resolved. Death is too severe a punishment to inflict if the law is unclear. Moreover, death may be inflicted justly only if the procedures of trial and review are scrupulously fair in every detail. Justice Blackmun's opinions, particularly after *Lockett*, are an almost unbroken litany finding fault with one procedure after another. Likewise, his opinions from the mid-1980s onward lament the federal courts' disinclination to review death penalty cases with the care Justice Blackmun believed they deserve. Because the requisite level of certainty in imposing the death sentence was, for Justice Blackmun, impossible to achieve, he rejected the penalty. Unlike the officer, who seems to believe that the colony's executions have always complied with the commandment "Be Just," Justice Blackmun concluded that just executions were an impossibility under current law and procedure. He never conclusively resolved the essential question of the legitimacy of capital punishment.

Whatever one thinks of Justice Blackmun's conclusion in *Callins*, his legacy on the death penalty seems as unsatisfying as the story's ending. If Justice Blackmun's conception of judging remained constant, valuing highly the ideals of deference and faithful application of the law, then the statements of personal belief and the emotional tone of his opinions were inappropriate. These statements seemed disingenuous when they accompanied contrary votes. Moreover, Justice Blackmun's penchant for painstaking review of the facts of each case, and his insistence toward the end of his tenure on the need for searching federal review, collided with his purported deferential stance. If, on the other hand, Justice Blackmun came to believe that his role as a judge in the court of last resort, in cases of life and death, was to impose his moral judgment (for lack of any other way to resolve this pressing question), then he failed to do so unequivocally by rejecting the penalty once and for all. If this is the role of the judge, his or her pronouncements must be clear and unambiguous. Justice Blackmun's remained equivocal to the end.

Few of us will ever know what it is to grapple with so serious and difficult an issue. We are spared the terrifying "glimpse into hitherto undiscerned depths"⁵³⁵ that judges face in capital punishment cases. Justice Blackmun's candor about his struggle to resolve the issue assures us of the gravity and care with which he approached each case. But his emotion and his equivocation deprive us of the certainty our law requires. In the end, like the explorer, Justice Blackmun left us without a substitute for the constitutional framework he rejected. His *Callins* announcement offers little guidance to resolve the issue he

535. GREENBERG, *supra* note 350, at 205.

has left unanswered, and even less reason to hope that the courts will ever get it right.

Appendix I — Summary of Justice Blackmun's Votes

Decisions with Blackmun opinion

	<u>NO (%)</u>	<u>YES (%)</u>
1970-1977	2 (22)	7 (78)
1978-1985	8 (80)	2 (20)
1986-1994	24 (96)	1 (4)
<i>Total</i>	<i>34 (77)</i>	<i>10 (23)</i>

Decisions with no Blackmun opinion

	<u>NO (%)</u>	<u>YES (%)</u>
1970-1977	1 (25)	3 (75)
1978-1985	8 (61)	5 (38)
1986-1994	35 (92)	4 (8)
<i>Total</i>	<i>44 (79)</i>	<i>12 (21)</i>

All decisions with signed opinions

	<u>NO (%)</u>	<u>YES (%)</u>
1970-1977	3 (23)	10 (77)
1978-1985	16 (73)	6 (27)
1986-1994	55 (92)	5 (8)
<i>Total</i>	<i>78 (78)</i>	<i>22 (22)</i>

Per curiam decisions

	<u>NO (%)</u>	<u>YES (%)</u>
1970-1977	3 (75)	1 (25)
1978-1985	3 (33)	6 (67)
1986-1994	8 (89)	1 (11)
<i>Total</i>	<i>14 (64)</i>	<i>8 (36)</i>

All decisions

	<u>NO (%)</u>	<u>YES (%)</u>
1970-1977	6 (35)	11 (65)
1978-1985	19 (61)	12 (39)
1986-1994	63 (91)	6 (9)
<i>Total</i>	<i>92 (75)</i>	<i>30 (25)</i>

Appendix II — Chronology of Death Penalty Cases⁵³⁶

Cases with Blackmun opinion

	<u>HB's Vote</u> ⁵³⁷	<u>Opin. Type</u> ⁵³⁸
Furman v. Ga. (1972)	Y	D
Moore v. Ill. (1972)	N	M
Gregg v. Ga. (1976)	Y	C
Proffitt v. Ga. (1976)	Y	C
Jurek v. Tex. (1976)	Y	C
Woodson v. N. Car. (1976)	Y	D
Roberts v. La. (1976)	Y	D
Gardner v. Fla. (1977)	N	C
Roberts v. La. (1977)	Y	D
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Lockett v. Ohio (1978)	N	C
Bell v. Ohio (1978)	N	C
Bullington v. Mo. (1981)	N	M
Marshall v. Lonberger (1983)	N	D
Barefoot v. Estelle (1983)	N	D
Barclay v. Fla. (1983)	N	D
Calif. v. Ramos (1983)	N	D
Maggio v. Williams (1983)	N	D
Spaziano v. Fla. (1984)	Y	M
Baldwin v. Ala. (1985)	Y	M
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Cabana v. Bullock (1986)	N	D
Darden v. Wainwright (1986)	N	D
Calif. v. Brown (1987)	N	D
McCleskey v. Kemp (1987)	N	D
Gray v. Miss. (1987)	N	M
Sumner v. Shuman (1987)	N	M
Burger v. Kemp (1987)	N	D
Satterwhite v. Tex. (1988)	N	C
Mills v. Md. (1988)	N	M
Dugger v. Adams (1989)	N	D
Clemons v. Miss. (1990)	N	CP/DP
Walton v. Ariz. (1990)	N	D

536. I have attempted to include all cases raising issues relating to the validity of the death penalty, the manner of its imposition, or the availability of review. Cases raising other types of issues, such as the retrospective application of a new rule, are excluded if they raise no specific death penalty issues, even if a death sentence was imposed.

537. This column records Justice Blackmun's vote, not the Court's decision. Y=imposes/upholds the death penalty; N=declines to apply or enforce the death penalty.

538. M=majority; C=concurrence; D=dissent; CP/DP=concurrence in part and dissent in part; P=plurality.

Lewis v. Jeffers (1990)	N	D
Dawson v. Del. (1992)	N	C
Coleman v. Thompson (1992)	N	D
Sawyer v. Whitley (1992)	N	C
Herrera v. Collins (1993)	Y	D
Arave v. Creech (1993)	N	D
Delo v. Blair (1993)	N	D ⁵³⁹
Romano v. Okla. (1994)	N	D
Simmons v. S. Car. (1994)	N	P
McFarland v. Scott (1994)	N	M
Tuilaepa v. Calif. (1994)	N	D
Schiro v. Farley (1994)	N	D
Victor v. Neb. (1994)	N	CP/DP

Cases with no Blackmun opinion

HB's Vote

McGautha v. Calif. (1971)	Y
Schick v. Reed (1974)	Y
Davis v. Ga. (1976)	Y
Coker v. Ga. (1977)	N

Godfrey v. Ga. (1980)	N
Beck v. Ala. (1980)	N
Adams v. Tex. (1980)	N
Estelle v. Smith (1981)	N
Eddings v. Okla. (1982)	Y
Enmund v. Fla. (1982)	N
Zant v. Stephens (1983)	Y
Pulley v. Harris (1984)	Y
Strickland v. Washington (1984)	Y
Ariz. v. Rumsey (1984)	N
Wainwright v. Witt (1985)	Y
Ake v. Okla. (1985)	N
Caldwell v. Miss. (1985)	N

Skipper v. S. Car. (1986)	N
Turner v. Murray (1986)	N
Poland v. Ariz. (1986)	N
Lockhart v. McCree (1986)	Y
Ford v. Wainwright (1986)	N
Tison v. Ariz. (1987)	N
Hitchcock v. Dugger (1987)	N

539. Although this is a per curiam decision of the Court, Justice Blackmun filed a brief dissenting opinion on the merits. Thus for purposes of analyzing his opinions, I have treated it as a case with an individual opinion.

Booth v. Md. (1987)	N
Lowenfield v. Phelps (1988)	Y
Maynard v. Cartwright (1988)	N
Johnson v. Miss. (1988)	N
Ross v. Okla. (1988)	N
Franklin v. Lynaugh (1988)	Y
Thompson v. Okla. (1988)	N
S. Car. v. Gathers (1989)	N
Penry v. Lynaugh (1989)	N
Stanford v. Ky. (1989)	N
Blystone v. Penn. (1990)	N
Boyde v. Calif. (1990)	N
McKoy v. N. Car. (1990)	N
Saffle v. Parks (1990)	N
Whitmore v. Ark. (1990)	Y
Sawyer v. Smith (1990)	N
Minnick v. Miss. (1990)	N
Parker v. Dugger (1990)	N
Ariz. v. Fulminante (1991)	N
Lankford v. Idaho (1991)	N
Yates v. Evatt (1991)	N
Mu'Min v. Va. (1991)	N
Schad v. Ariz. (1991)	N
Payne v. Tenn. (1991)	N
Stringer v. Black (1992)	N
Riggins v. Nev. (1992)	N
Sochor v. Fla. (1992)	N
Morgan v. Ill. (1992)	N
Richmond v. Lewis (1992)	N
Lockhart v. Fretwell (1993)	N
Graham v. Collins (1993)	N
Johnson v. Tex. (1993)	N

Per curiam decisions

	<u>HB's Vote</u>
Maxwell v. Bishop (1970)	N
Hunter v. Tenn. (1971)	N
Stewart v. Mass. (1972)	N
Dobbert v. Fla. (1977)	Y
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Presnell v. Ga. (1978)	N
Green v. Ga. (1979)	N
Zant v. Stephens (1982)	Y
Ala. v. Evans (1983)	Y
Autry v. Estelle (1983)	N
Wainwright v. Goode (1983)	Y
Sullivan v. Wainwright (1983)	Y

Woodard v. Hutchins (1984)	Y
Antone v. Dugger (1984)	Y

Hildwin v. Fla. (1989)	Y
Powell v. Tex. (1989)	N
Selvage v. Collins (1990)	N
Shell v. Miss. (1990)	N
Cage v. La. (1990)	N
Gomez v. U.S. Dist. Ct. (1992)	N
Espinosa v. Fla. (1992)	N
Dobbs v. Zant (1992)	N
Delo v. Lashley (1993)	N